

No. 82-1608

Office - Supreme Court, U.S.

FILED

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

v.

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.,*
Respondents,

v.

KENAI LUMBER CO., INC.,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 30, 1983
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**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

JOINT APPENDIX

Chronological List of Relevant Docket Entries

1980

- Oct. 16—Complaint of South-Central Timber Development, Inc. filed. Motions of South-Central Timber Development for Preliminary Injunction and Temporary Restraining Order filed. Memorandum of Law of South-Central Timber Development in Support of Injunctive Relief filed. Plaintiff's Affidavits of Clyde Tanaka and James N. Wanamaker filed. Oral Argument on Motion by South-Central Timber Development for TRO set for Oct. 20, 1980.
- Oct. 20—Opposition of Defendants (Robert LeResche, Geoffrey Haynes, Theodore Smith) to Motion by South-Central Timber Development for TRO filed. Defendants' Affidavit of David Wallingford filed. Plaintiff's Supplemental Affidavit of James N. Wanamaker filed. Memorandum of Law by South-Central Timber Development in Reply to Opposition by LeResche, *et al.* to Motions for Injunctive Relief filed. Court Minutes re Oral Argument on Motion for TRO filed—Decision Reserved.
- Oct. 21—Memorandum and TRO Restraining State from Conducting Icy Cape No. 2 Timber Sale Scheduled for Oct. 23, 1980 filed. Order filed Setting Preliminary Pretrial Conference.
- Oct. 31—Motion by Kenai Lumber Co., Inc. to Intervene as Defendant filed.
- Nov. 14—Stipulation filed that Parties do not Oppose Motion for Intervention by Kenai Lumber.
- Nov. 18—Memorandum and Order Allowing Kenai Lumber to Intervene as Defendant filed. Motion by Kenai Lumber to Dismiss and Memorandum in Support filed. Brief by Kenai Lumber on Constitutionality of Primary Manufacture filed. Motion by South-Central Timber Development for Summary Judgment filed. Plaintiff's Affidavit of H. Sugiyama filed.

Nov. 19—Motion by LeResche, *et al.* for Summary Judgment and Memorandum in Support filed.

Dec. 3—Opposition by Kenai Lumber to Motion by South-Central Timber Development for Summary Judgment and Memorandum in Support of Motion by LeResche, *et al.* for Summary Judgment filed. Reply by South-Central Timber Development to Memorandum of Law by LeResche, *et al.* in Support of Its Cross-Motion for Summary Judgment filed. Plaintiff's Supplemental Affidavit of H. Sugiyama filed.

Dec. 5—Reply Memorandum by State in Support of Motion for Summary Judgment and in Opposition to Motion of South-Central Timber Development for Summary Judgment filed.

1981

Jan. 5—District Court's Memorandum and Order Granting Motion by South-Central Timber Development for Summary Judgment filed; Motion by LeResche, *et al.* for Summary Judgment denied; Motion by Kenai Lumber to Dismiss denied.

Jan 9.—Final Judgment of the District Court Permanently Enjoining Alaska From Requiring Primary Manufacture of State-Owned Timber, dated Jan. 6, 1981, filed.

Jan. 15—Notice of Appeal by LeResche, *et al.*, filed.

Jan. 20—Case No. 81-3053 docketed and Appearances of Counsel entered.

Jan. 23—Notice of Appeal by Kenai Lumber filed.

Jan. 27—Statement of Issues by Appellant filed.

Feb. 2—Case No. 81-3081 docketed and Appearance of Counsel entered.

Feb. 24—Stipulation and Order Consolidating Appeals No. 81-3053 and No. 81-3081 filed.

Mar. 4—Copy of Ninth Circuit Order Consolidating Appeals No. 81-3052 and No. 81-3081 filed.

April 21—Brief and Excerpts of Record by Kenai Lumber filed.

May 20—Motion for Leave to File and Brief of Amicus Curiae by Association of Western Pulp and Paper Workers and its Affiliated Ward Cove, Alaska Local 783 and of International Woodworkers of America, AFL-CIO, Western States Regional Council No. 3 and its Affiliated Alaska Local 3-193 filed.

June 3—Order filed Granting Leave to File Amicus Brief to Association of Western Pulp and Paper Workers and its Affiliated Ward Cove, Alaska Local 783 and the International Woodworkers of America, AFL-CIO, Western States Regional Council No. 3 and its Affiliated Alaska Local 3-193. Brief, heretofore received, ordered filed.

June 11—Brief of State of Alaska filed. Excerpts of Record, filed by Kenai Lumber Co, adopted.

June 23—Brief of South-Central Timber Development filed.

July 16—Reply Brief of Appellant Kenai Lumber filed.

July 21—Reply Brief of Appellant State of Alaska filed.

Dec. 10—Appeal argued and submitted before Goodwin, Kennedy, and Skopil.

1982

Dec. 1—Ninth Circuit Court ordered Opinion (Kennedy) reversing District Court Opinion filed and Judgment to be filed and entered.

1983

Feb. 3—Ninth Circuit Order awarding Kenai Lumber Co. costs in amount of \$352.00 filed.

Feb. 15—Ninth Circuit Mandate issued and amended to include costs.

COMPLAINT (FILED OCT. 16, 1980)

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(907) 279-6591

Attorneys for Plaintiff
SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and

THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,

Defendants.

FILED
OCT 16 1980
United States District Court
District of Alaska
By DC Deputy

COMPLAINT

COMES NOW the Plaintiff, SOUTH-CENTRAL TIMBER DEVELOPMENT, INC. (hereinafter "SOUTH-CENTRAL TIMBER"), by and through its attorneys of record WANAMAKER, DEVEAUX & CRABTREE, APC, and alleges as follows:

JURISDICTION

1. This action arises under the Constitution of the United States, Article I, § 8, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000, and, therefore, jurisdiction lies under 28 U.S.C. § 1331(a). Insofar as this Complaint seeks Declaratory Judgment, it is based on 28 U.S.C.A. 2201 and Rule 57 Federal Rules of Civil Procedure.

2. Plaintiff now is, and since July 18, 1967, has been a domestic corporation, duly organized and existing under the laws of the State of Alaska, engaged in the business, among other things, of purchasing standing timber in the State of Alaska, logging or contracting for the logging of such timber, and shipping the resulting logs from Alaska and into foreign commerce. Plaintiff's corporate offices are located at Anchorage, Alaska, and it has timber processing facilities at Icy Bay, Alaska (near Cape Yakataga), and Jakalof Bay, Alaska (near Homer). Plaintiff has paid its Alaska and United States corporate taxes last due and filed its Alaska corporate report last due.

3. Defendant ROBERT LERESCHE is Commissioner of the Department of Natural Resources, State of Alaska. Pursuant to AS 38.05.115, the Commissioner

"upon recommendation of the director, shall determine the timber and other materials to be sold, and the limitations, conditions and terms of sale."

4. Defendant GEOFFREY HAYNES is the Deputy Commissioner of the Department of Natural Resources, State of Alaska. GEOFFREY HAYNES is also the Director of the Division of

Lands of the Department of Natural Resources, State of Alaska. Defendant HAYNES, therefore, has authority to recommend terms and conditions of Alaska timber sales and to conduct such timber sales. Some of the functions which said Defendant GEOFFREY HAYNES would otherwise exercise in his capacity of Director of the Division of Lands have been delegated to THEODORE G. SMITH, the Director of the Division of Forest, Land and Water Management of the Department of Natural Resources of the State of Alaska, pursuant to written delegations, a copy of which is attached as Exhibit A.

5. Defendant THEODORE G. SMITH is the Director of the Division of Forest, Land and Water Management of the Department of Natural Resources of the State of Alaska. Pursuant to AS 38.05.110, *et seq.*, and the delegations of authority attached as Exhibit A, and certain administrative regulations, specifically 11 AAC 76.005, *et seq.*, he is the state official having authority and responsibility, subject to the approval by Defendant LERESCHE, to recommend timber sales and terms of sale, and to conduct competitive timber sales.

6. AS 38.05.120 declares that any violation of Title 38 of the Alaska Statutes, or any terms of a contract for the sale of timber, subjects the violator to appropriate legal action. 11 AAC 76.175 likewise provides that if the purchaser of a timber sale breaches any of the provisions of the contract, then "the director may terminate the contract and all timber or forest products for which title has not passed shall vest in the state. . . ."

7. The Defendants have advertised a notice of sale for a sale of approximately 49,185,000 board feet of timber in the area of Icy Cape, Alaska. This proposed sale, which is known as the Icy Cape No. 2 Timber Sale, is scheduled to be sold at public auction on October 23, 1980, at 2:00 o'clock p.m.

8. The notice of said Icy Cape No. 2 Timber Sale provides as follows:

"Primary manufacture within the State of Alaska will be required as a special provision of the contract."

9. Both versions of the Prospectus for said Icy Cape No. 2 Timber Sale provide as follows:

"Primary manufacturer.

Primary manufacture shall be as defined under Section 11 AAC 76.130 of the "Timber Sales Regulations" and as further defined in the Governor's "Policy Statement on Primary Manufacture" dated May 7, 1974."

10. The Timber Sale Contract, which the Defendants have developed for use on the Icy Cape No. 2 Timber Sale, and which the successful bidder will be required to sign, provides as follows:

"Section 68. Primary Manufacture. Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974. For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in waste.

Chips are considered to have received primary manufacture."

11. The primary manufacture regulation 11 AAC 76.130 provides as follows:

"11 AAC 76.130. PRIMARY MANUFACTURE.

(a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent

that the residual cants, slabs or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture."

12. The document attached as Exhibit B is a correct copy of the Governor's Policy Statement on Primary Manufacture dated May 7, 1974.

13. Plaintiff SOUTH-CENTRAL TIMBER is actively engaged in timber operations in the State of Alaska. Plaintiff is, in fact, actively logging the State of Alaska Icy Cape No. 1 Timber Sale, which is immediately adjacent to the proposed Icy Cape No. 2 Timber Sale. Primary manufacture is not required of logs removed from the Icy Cape No. 1 Timber Sale.

14. Plaintiff SOUTH-CENTRAL TIMBER would like to bid on the Icy Cape No. 2 Timber Sale. However, SOUTH-CENTRAL TIMBER no longer has a mill capable of processing this volume of timber into cants, its mill having been effectively closed by the need to comply with State of Alaska air pollution requirements. Accordingly, SOUTH-CENTRAL TIMBER is placed at a serious disadvantage in bidding in that, since it does not have a mill of its own, it would have to take into account the added costs of making cants in the mill of another company within the working circle of this sale. Unless the unconstitutional requirement of primary manufacture is removed by this Court, such added costs will effectively remove SOUTH-CENTRAL TIMBER from the bidding on this sale.

15. The primary manufacture requirement 11 AAC 76.130 is illegal and should be enjoined for the following reasons:

(A) It violates Article I, § 8, of the Constitution of the United States of America for the following reasons:

(1) It is a *per se* violation of the Commerce Clause of the United States Constitution and is contrary to the doctrine as established in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *West v. Kansas Nat. Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and *Hicklin v. Orbeck*, 437 U.S. 518 (1978);

(2) The regulation is an illegal attempt by the Defendants to prefer the citizens of the State of Alaska in the utilization of natural resources found within the State of Alaska but destined for interstate or foreign commerce;

(3) The primary manufacture requirement directly obstructs and discriminates against interstate and foreign commerce and the right to carry on such commerce.

(B) No action of the Alaska Legislature has authorized the adoption of such primary manufacture regulations.

(C) 11 AAC 76.130 is unconstitutionally vague.

16. Plaintiff alleges that there has been no legislative authorization for the adoption of the regulation 11 AAC 76.130.

17. Plaintiff alleges that 11 AAC 76.130 is unconstitutionally vague and its enforcement as a timber sale provision should be enjoined.

18. Plaintiff alleges that the Governor's Policy Statement on Primary Manufacture, dated May 7, 1974, does not have the force and effect of law, and may not be utilized either as a legal requirement of Alaska timber sales or an interpretive aid to 11 AAC 76.130.

19. Plaintiff alleges that the terms of sale for Icy Cape No. 2 Timber Sale were changed during the advertising period.

The first Prospectus provided by the STATE OF ALASKA stated:

"Method of Payment

The bid deposit will be credited to the stumpage deposit at the time of signing of the contract by the purchaser. The State will refund the excess bid deposit to the Purchaser at that time.

Prior to cutting of any timber under this contract, the purchaser will deposit with the State an advance stumpage deposit equal to the value of timber estimated to be cut in not less than 30 calendar dauys [sic] nor more than 60 calendar days."

The second Prospectus provided by the STATE OF ALASKA stated:

"Method of Payment

Purchaser shall furnish a payment bond in the amount of \$250,000.00. When the payment bond has been furnished to the State the bid deposit will be refunded.

Purchaser shall submit stumpage payments and scale reports to the State on the 10th of each month for the previous months cutting."

The difference between the two Prospectuses is as follows:

Prospectus	Amount of Cash Money Which Can Be Retained By State
Version #1	Up to \$836,000
Version #2	Apparently none if a \$250,000 payment bond is provided.

Plaintiff is genuinely confused as to which is the legal requirement for this sale. If Version #1 is controlling, it will mean an increased cost of approximately \$140,000 per year, assuming borrowing at 17 to 18 percent interest.

20. The Defendants have performed or adopted an appraisal which does not accurately appraise stumpage value in that it

contains a gross error in the computation of transportation costs; it being a practical impossibility to raft logs from Icy Cape No. 2 through the Gulf of Alaska, and in fact logs must be transported by barge at a higher cost. Said higher cost would indicate transportation costs of approximately \$55 per thousand board feet greater than appraised.

21. The contract for said Icy Cape No. 2 Timber Sale provides for stumpage reappraisal in February 1981 and each February thereafter. The Defendants have not indicated in official sale documents how or if such appraisal mistake as noted in paragraph 20 above will be corrected. Accordingly, potential bidders are left only speculation as to how stumpage will be determined.

22. This Icy Cape No. 2 Timber Sale is unique in that it will be the last opportunity for a substantial STATE timber sale in the Gulf of Alaska for many years to come for the reason that determinations have been made by the STATE that Icy Cape No. 2 Timber Sale will result in such a complete utilization of the allowable annual cut for the State forest lands that accordingly other timber sales will not be made in this area in the near future.

23. SOUTH-CENTRAL TIMBER has at the present time only one timber sale contract (the State of Alaska Icy Cape No. 1 Timber Sale) on which it is conducting logging operations. It is expected that this contract will be finished in two or three operating seasons. Unless SOUTH-CENTRAL TIMBER is permitted to bid on the Icy Cape No. 2 Timber Sale, it will face the prospect of having to cease logging operations by reason of the unavailability of timber. Thus, Plaintiff will suffer irreparable harm and injury unless the Icy Cape No. 2 Timber Sale is enjoined until such time as it is conducted in conformity with law.

24. Unless the Defendants are enjoined from holding the Icy Cape No. 2 Timber Sale until such time as they have removed the constitutional defect of requiring primary manufacture, and have renoticed the sale with legal terms, Plaintiff will be effectively eliminated from the bidding process.

25. Unless the Defendants are enjoined from holding the Icy Cape No. 2 Timber Sale until such time as they have removed the legal defects, in addition to the primary manufacture defect, Plaintiffs may be required to bid on a sale which has not been legally conducted and which can be voided at the instance of another bidder or other person having standing to sue.

26. Plaintiff further alleges that in the event that this sale is enjoined on grounds other than the illegality of primary manufacture, or the Defendants agree to reschedule the sale but have not eliminated the primary manufacture requirement, then in that event, this is an appropriate case for use of Declaratory Judgment and requests that this Court enter its Declaratory Judgment declaring the primary manufacture requirement 11 AAC 76.130 to be unconstitutional, illegal, and invalid, and that the State of Alaska may not legally convey timber within the Icy Cape No. 2 Timber Sale area until such time as that requirement is removed from the notice, prospectus, and contract of sale.

27. Further, Plaintiff alleges that it would be appropriate for this Court, after enjoining this sale until defects are corrected, to require Defendants to continue its proceedings for this sale and hold the sale with the primary manufacture requirement eliminated and other legal defects corrected, since to cancel the sale would be to punish SOUTH-CENTRAL TIMBER for insisting upon its constitutional rights.

WHEREFORE, the Plaintiff prays:

1. For preliminary and permanent injunction restraining the Defendants from conducting the Icy Cape No. 2 Timber Sale until such time as the requirement of primary manufacture has been eliminated from the notice, prospectus, and contract of sale, and other legal defects have been cured, and the sale has been properly noticed.

2. For a temporary restraining order, restraining the Defendants from conducting said Icy Cape No. 2 Timber Sale until this matter can be heard and determined.

3. That this Court enter Declaratory Judgment declaring 11 AAC 76.130 to be unconstitutional, illegal, and invalid.

4. That this Court require Defendants to continue the proceedings for the Icy Cape No. 2 Timber Sale and hold the sale with the primary manufacture requirement eliminated and other legal defects corrected, since to cancel the sale altogether would be to punish SOUTH-CENTRAL TIMBER for insisting upon its constitutional rights.

5. That the Plaintiff recover its costs and attorneys' fees herein.

6. For such other and further relief as the Court deems just and equitable in the premises.

RESPECTFULLY SUBMITTED this 15th day of October, 1980.

SOUTH-CENTRAL TIMBER
DEVELOPMENT, INC.

/s/By H. Sugiyama
H. SUGIYAMA
Vice President

WANAMAKER, DEVEAUX, & CRABTREE
A Professional Corporation

/s/By LeRoy E. DeVeaux
LEROY E. DEVEAUX

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

H. SUGIYAMA, being first duly sworn, deposes and says:

I am the Vice President of SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., and make this verification for and on behalf of said corporation; SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., is the Plaintiff named in the foregoing COMPLAINT; I have read the foregoing COMPLAINT and understand the contents thereof; I have executed it freely and voluntarily on behalf of

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., as Vice President for the purpose set forth therein; and the same is true of my own knowledge.

/s/ H. Sugiyama
H. SUGIYAMA

SUBSCRIBED and SWORN to before me this 15th day of October, 1980.

/s/ Anita M. Mowery
ANITA M. MOWERY
Notary Public for Alaska
My commission expires: 10/4/82

ANITA M. MOWERY
NOTARY PUBLIC
STATE OF ALASKA

MEMORANDUM**STATE OF ALASKA****TO: Division Directors****FROM: Jeff Haynes**
Deputy Commissioner**DATE: July 1, 1980****FILE NO: 81/001****TELEPHONE NO:****SUBJECT: DEPARTMENT ORDER 81/001**
Department Management System

The contents of this Department Order describe the management system for the Department of Natural Resources. All operations of the Department shall be consistent with this management system. The six components of the Department management system are:

- (1) Department Organization
- (2) Delegations of Authority
- (3) Project Budgeting/Monitoring/Accounting System
- (4) Regional Resource Plans
- (5) Department Orders
- (6) Directors' Meetings

I. DEPARTMENT ORGANIZATION

The Department of Natural Resources is arranged by function. There are five functions contained within the Department. The five functions, and corresponding entities, are:

Function	Entity
Executive Office	Commissioner Deputy Commissioner Special Assistants Boards/Advisory Committees
Resource Inventory/Assessment	Division of Geological and Geophysical Surveys
Resource Research	Division of Research and Development

Resource Management	Division of Forest, Land and Water Management
	Division of Agriculture
	Division of Minerals and Energy Management
	Division of Parks
Department Services	Division of Administration and Management
	Division of Technical Services

The more specific duties of these entities are set out below.

A. Executive Office

The Commissioner is the chief executive officer of the Department, and possesses final decisionmaking authority on all matters within the jurisdiction of the Department unless said authority has been subdelegated to subordinate officers. As a member of the Cabinet, he reports on behalf of the Department to the Governor, the Legislature, and the Judiciary on matters affecting the Department.

The Deputy Commissioner is the second executive officer of the Department and may act on behalf of the Commissioner on all matters consistent with instructions from the Commissioner. He is also responsible for general management of all operations of the Department.

Special Assistants report through the Deputy Commissioner to the Commissioner and perform staff functions as assigned. Special Assistants do not possess line decisionmaking authority unless specifically vested with that authority by the Commissioner or Deputy Commissioner after notification to affected Division Directors. If the Department is operating properly, there should be no occasion to vest Special Assistants with line decisionmaking authority.

Boards and Advisory Committees perform the functions established by the statutes creating them.

B. Resource Inventory/Assessment

The Division of Geological Surveys is responsible for performing the Resource Inventory/Assessment function for the Department. This function consists of gathering, assessing, and compiling information relating to surface and subsurface resources, including minerals, coal, oil and gas, geothermal energy, water, uranium, soils, geologic hazards, vegetation, soils, timber, general surficial and subsurficial features, and use and settlement. The finished product should be sufficient for the Division of Research and Development to formulate alternative courses of action for the Department to take respecting the natural resources in question, or for a particular division to carry out a Project already approved by the Department. Generally, the Projects performed by the Division of Geological and Geophysical Surveys will be generated through requests from the Commissioner or other Divisions within the Department based on foreseeable needs.

C. Resource Research

The Resource Research function is performed by the Division of Research and Development. On a standard resource development Project, the Division of Research and Development will translate inventory and assessment data provided by the Division of Geological and Geophysical Surveys into alternative courses of action for approval by the Commissioner. The Division of Research and Development is also the one inter-divisional division within the Department, performing Projects which affect two or more divisions and therefore require a clearinghouse process. Under the Resource Research function, the Division of Research and Development performs six subfunctions:

- (1) Development of a data processing network (ALARS) which will serve the requirements of various other divisions, at least to the point that a particular system is operational. At that stage, a decision will be made as to whether the system is retained by the Division or moved to the supervising authority of another division.

- (2) Operation of a Departmental clearinghouse covering A-95 referrals, coastal management procedures, mat-

ters referred by the Commissioner or other agencies, legislation, and similar items. The purpose is to establish one entity which assimilates materials and positions from various divisions, synthesizes a common position with the consent of affected divisions, and refers appropriate matters to the Commissioner for decision.

(3) Development of regional resource plans through the consensus of all entities within the Department which reflect, on a general the Department's geographic policy in the form of preferences among beneficial uses of State lands.

(4) Performance of general policy research at the request of the Commissioner.

(5) Development of policies and Projects, under the direction of the Commissioner, relating to obtaining and defending title to State lands.

(6) Operation of an information program for the Department and a repository for informational materials generated by the Department.

As the interdivisional division within the Department, the Division of Research and Development must undertake all of its responsibilities with the consent of other affected entities rather than unilaterally.

D. Resource Management

The Resource Management function is performed by five divisions. Generally, the Division of Forest, Land and Water Management is responsible for management of the surface and the Division of Minerals and Energy Management is responsible for management of the subsurface. Each of those Divisions is charged with obtaining the consent of the other where proposed actions affect both the surface and the subsurface. In addition where an area of the surface has been designated with a primary beneficial use of agriculture, recreation, or pipeline corridor (through legislative designation regional resource plan, or legal instrument), a proposed action must operate by mutual consent between the Divisions of Agriculture, Parks, and Pipeline surveillance, respectively, and the Divisions of Minerals and Energy Management and Forest, Land and Water Management, as appropriate.

The Division of Forest, Land and Water Management is responsible for general surface management of State lands, including water rights administration, forest development and regeneration, fire protection and suppression, and complete as well as limited disposals of state land for private/municipal use. The Division performs classification of State lands into various retention and disposal categories with respect to the surface, and administers legal documents consummating a disposal into private use or ownership.

The Division of Minerals and Energy Management is charged with the general management of the subsurface of State lands, which is retained even where the surface is disposed of for private use. The Division performs the permitting/leasing of State lands for development of oil and gas, coal, minerals, and geothermal energy resources and administers the permitting/leasing documents for compliance with terms and payment of revenues. In addition, the classification of subsurface lands is effectively accomplished through administration of mineral closing orders.

The Division of Agriculture is responsible for the promotion, development, and financing of the agricultural industry in the State. The Division designs agricultural projects and sales, administers the agricultural loan program, and develops and promotes agricultural products through plant/seed materials development, marketing/transportation research, and state fairs.

The Division of Parks operates the State Park System (consisting of legislatively designated lands and capital facilities) and administers Federal and State grant programs for outdoor recreation, historical preservation, and youth conservation corps.

The Division of Pipeline Surveillance is responsible for administration of pipeline corridors (created through regional plans and a legal instrument in the form of a right-of-way lease) as well as comprehensive preparatory activities which must precede the negotiation of a pipeline right-of-way lease.

Generally, the Resource Management Divisions carry out Projects which have been approved by the Commissioner after raw data has been gathered by the Division of Geological and Geophysical Surveys and alternatives have been submitted to the Commissioner after formulation by the Division of Research and Development.

E. Department Services

Department Services are performed by the Division of Administration and Management and the Division of Technical Services for all entities within the Department. They may occur at any time during the Resource Inventory/Assessment to Resource Research to Resource Management Process.

The Division of Administration and Management generally handles fiscal, personnel, and property matters, monitors compliance with the Project Budgeting/Monitoring/Accounting component of the Department management system, and provides centralized administrative services.

The Division of Technical Services is responsible for surveying and engineering performed on behalf of other Divisions including necessary preparatory work. In addition, the Division administers the State Recorder's Office and serves as the repository for all State land records, which it is charged with maintaining.

An organization chart reflecting the above is attached and incorporated into this Department Order as Attachment I.

II. DELEGATIONS OF AUTHORITY

The responsibilities of each Department entity reflected in the above discussion of the Department Organization are more specifically enumerated and described in the Delegations of Authority. In this document, all of the legal authorities vested by law in the Department are listed and expressly assigned to the Commission, the Deputy Commissioner (who serves in the statutory capacity of Director of Lands) or one or more of the Divisions. Divisions are prohibited from undertaking any ac-

tion inconsistent with the Delegations of Authority, and any action undertaken by the Department must receive the approvals reflected by the allocations of legal responsibilities contained in the Delegations of Authority.

The Delegations of Authority are attached and incorporated into this Department Order as Attachment II.

III. PROJECT BUDGETING/MONITORING/ ACCOUNTING SYSTEM

The Project Budgeting/Monitoring/Accounting component of the Department management system establishes the Department's agenda for the fiscal year and allocates the funds appropriated to the Department by the Legislature. It also monitors progress towards completing the agenda during the fiscal year and insures that funds are being expended for the purpose they were appropriated. This component consists of the following elements.

(1). *Project Budget.* Beginning approximately a year before the start of a fiscal year, the Department formulates its proposed budget. Generally, the Department budget is arranged in a series of Budget Request Units and Components on a programmatic basis; that is, matters of like subject matter are grouped together. Budget Request Units are general (e.g., Forest Management) and Components within Budget Request Units are more specific (e.g., Timber Inventory/Sales, Forest Research, Fire Protection/Suppression). Objectives are set for each BRU.

To formulate the budget, the Department collectively develops a list of individual Projects (which may be operating, capital, or a mixture), which consists of all of the conceivable activities which could be performed during the upcoming fiscal year. To develop the list, the Department considers public demands and expectations, legislative requests or expected interests, requests from the Governor, and the recommendations of the Department managers.

DEPARTMENT ORDER
81-001
ATTACHMENT II

DATE: 7/2/79

VESTED BY
STATUTE IN:

DELEGATED TO:

DEPARTMENT OF NATURAL RESOURCES
DELEGATION OF AUTHORITY
FOR DIVISION OF LANDS

	Commissioner	Director, ADL	Director, FLWM	Director, FLWM	Director, MEM	Director, FLWM (surface) and DMEM (subsurface)	Director, RD	Director, TS	Not delegated	Other/Remarks
	1	2	3	4	5	6	7	8	9	10
AS 16 FISH AND GAME										
AS 16.20.030(b) Zone Potter Point Refuge by regulation	X								X	
AS 16.20.030(d) Zone Goose Bay Refuge by regulation	X								X	
(e) Establish access corridors across Goose Bay Refuge to private land with ADF&G and property owners	X								X	
AS 16.20.032(d) Zone Palmer Hay Flats Refuge by regulation	X								X	
AS 16.20.034(g) Manage surface and subsurface of Mendenhall Flats	X					X				
AS 16.20.036(e) Zone Susitna Flats Refuge by regulation	X								X	
(f) Establish access corridors across Susitna Flats to private land with ADF&G and property owners	X								X	

DEPARTMENT OF NATURAL RESOURCES
DELEGATION OF AUTHORITY
FOR DIVISION OF LANDS

DATE: 7/2/79

VESTED BY
 STATUTE IN:

DELEGATED TO:

	Commissioner	Director, ADL	Director, FLWM	Director, FLWM	Director, MEM	Directors, FLWM (surface) and DMEM (subsurface)	Director, RD	Director, TS	Not delegated	Other/Remarks
	1	2	3	4	5	6	7	8	9	10
Adopt regulations covering waivers and ensuring fair return to State	X								X	
ARTICLE 4. DISPOSAL OF TIMBER AND MATERIALS										
AS 38.05.110 Provide for timber cruises and appraisals of other materials; recommend sales and terms of sale		X		X						
AS 38.05.115 Determine sales and conditions of sale	X			X						
Negotiate sales of up to 500 m.b.m. of timber or 25,000 cu. yds. materials		X		X						
Approve negotiated sales	X			X						
AS 38.05.118 Negotiate up to 25-year unlimited timber sales in areas of high unemployment		X		X						
Approve such sales	X								X	

DATE: 7/2/79

VESTED BY
STATUTE IN:

DELEGATED TO:

**DEPARTMENT OF NATURAL RESOURCES
DELEGATION OF AUTHORITY
FOR DIVISION OF LANDS**

	Commissioner	Director, ADL	Director, FLWM	Director, FLWM	Director, MEM	Directors, FLWM (surface) and DMEM (subsurface)	Director, RD	Director, TS	Not delegated	Other/Remarks
	1	2	3	4	5	6	7	8	9	10
AS 38.05.120 Determine high bidder; conduct sales; sign contracts; impose conditions		X		X						
Approve contracts and conditions; decide whether to sell at auction or by sealed bids	X			X						
Hear appeals of high bid determination	X								X	
Adopt regulations to determine amount of deposit	X								X	
ARTICLE 5. RESERVATION OF RIGHTS TO ALASKA										
AS 38.05.127 Reserve easements and rights-of-way for access to public waters	X			X						
Adopt regulations	X								X	
AS 38.05.130 Determine amount of surety bond to protect surface owner		X		X						

POLICY STATEMENT ON PRIMARY MANUFACTURE**Section 76.100, "Timber Sale Regulations"**

Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Timber processing wastes from west of 141° Longitude when manufactured into chips are considered to have received primary manufacture and may be exported. Timber processing wastes from east of 141° Longitude in Southeast Alaska when manufactured into chips are considered to have received primary manufacture and export may be permissive only on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue, or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only, e.g., to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 76.130 of the "Timber Sale Regulations" and supersedes all previous policy statements and/or resolutions.

/s/ William A. Egan
WILLIAM A. EGAN
Governor of Alaska

DATE: May 7, 1974

**INDEX TO MATERIALS RELEVANT TO ALASKA
PRIMARY MANUFACTURE REQUIREMENT
ATTACHED TO AFFIDAVIT OF JAMES N.
WANAMAKER (FILED OCT. 16, 1980)**

INDEX TO MATERIALS RELEVANT TO ALASKA PRIMARY MANUFACTURE

Alaska Statutes Concerning Primary Manufacture

There are no Alaska Statutes which require the imposition of primary manufacture on Alaska timber as a condition of export into interstate or foreign commerce.

Alaska Regulations

- Ex. 1: The primary manufacture regulation, 11 AAC 76.130.

Policy Statements and Resolutions

Over the years since 1961 there have been various Policy Statements by Alaska Governors and on one occasion a Resolution passed by the Alaska Senate. These are as follows:

- Ex. 2: Policy Statement of Governor Egan (1961).
Ex. 3: Logan Resolution, Senate Joint Resolution No. 59 adopted March, 1962.
Ex. 4: Policy Statement of Governor Egan (1962).
Ex. 5: Policy Statement of Governor Hickie (1968).
Ex. 6: Policy Statement of Governor Egan (1974).

Attempted Application of Primary Manufacture in Icy Cape No. 2 Timber Sale Contract

- Ex. 7: Notice of Timber Sale.
Ex. 8: Prospectus Version 1 obtained from State about September 9, 1980. See page 3 for primary manufacture requirement.
Ex. 9: Prospectus Version 2 distributed by State after first prospectus. See page 3 for primary manufacture requirement.
Ex. 10: Section 68 of Icy Cape No. 2 Timber Sale Contract.

Objections made by South-Central Against Including Primary Manufacture in Icy Cape No. 2

- Ex. 11: South-Central Timber Development, Inc., testimony for hearings of November 29, and November 30, 1979, cover letter by H. Sugiyama. Exhibit also includes "Alaska Log Export Policy" by Cal Kerr and Merlin Wibbenmeyer.
- Ex. 12: August 21, 1980 letter to Shelley Higgins, Assistant Attorney General with carbon copy to Ted Smith, Larry Dutton, and Russell Harding to effect that primary manufacture is unconstitutional. Exhibit 12 also includes the "Affidavit of Koichi (Clyde) Tanaka—Employment" which shows that round log export has created more jobs than primary manufacture.

**POLICY STATEMENT OF GOVERNOR WILLIAM
EGAN (1961) (EXHIBIT 2 TO AFFIDAVIT OF
JAMES N. WANAMAKER, FILED OCT. 16, 1980)**

GOVERNOR'S OFFICE NEWS RELEASE JUNE 30, 1961

Governor William A. Egan today announced a new State timber export policy permitting conditional export of minor timber species without primary manufacture within Alaska for experimental purposes aimed at building new markets.

The conditional authority would be restricted to a two-year introductory period.

Enunciation of the policy followed receipt of inquiries from several parties interested in the possible export of minor species such as cottonwood, Alaska cedar, aspen and birch.

Primary manufacture within Alaska will continue to be required prior to export of all major timber species such as Sitka spruce, Western hemlock and white spruce, the Governor said.

The policy statement issued by the Governor reads as follows:

"It is the policy of the State of Alaska to protect existing industries, provide for the establishment of new industries, derive revenue from all timber resources, and manage the State's forests on a sustained yield basis."

"The policy of the State of Alaska relating to the export and primary manufacture of timber, within the definition contained in Department regulation is as follows:"

"1. Primary manufacture, as defined by Department regulations, will be required for all major species such as Sitka Spruce, Western Hemlock and White Spruce."

"2. Minor species, such as Cottonwood, Alaska-cedar, Aspen and Birch *may be* exported in the form of round logs, with the advance approval of the Commissioner of Natural Resources on a showing of need for experimental purposes and for the introduction of the species to new markets, when in excess of that required by local industries but within the total allowable annual cut. The State may permit the export of round logs of such minor species to introduce Alaskan timber to new market areas or to new industries for a period of two

years, beginning with the date of first export to that market. Upon conclusion of the two year introductory period, primary manufacture will be required."

* * * * *

**LOGAN RESOLUTION, SENATE JOINT
RESOLUTION NO. 59 (ADOPTED MAR. 1962)
(EXHIBIT 3 TO AFFIDAVIT OF JAMES N.
WANAMAKER, FILED OCT. 16, 1980)**

Senate Joint Resolution No. 59, 1962 Legislature

Senate Joint Resolution No. 59 (adopted March, 1962) provides as follows:

"Relating to the state timber export policy.

"Be It Resolved by the Legislature of the State of Alaska in Second Legislature, Second Session Assembled:

"WHEREAS Westward Alaska has a large potential timber resource which is not being developed and utilized; and

"WHEREAS this replenishable timber resource can be harvested during the winter months of maximum unemployment; and

"WHEREAS the apparent allowable annual cut of the existing stands of mixed timber species far exceeds the demand for domestic uses; and

"WHEREAS there exists an export market willing to absorb this excess;

"BE IT RESOLVED by the Legislature of the State of Alaska in Second Legislature, Second Session assembled, that the Governor of Alaska consider liberalization of the state's timber export policy to allow (1) the extension of the present 2-year permit period allowing export of round logs in the minor species of cedar, birch, cottonwood, and aspen to 5 years, (2) the export of squared hemlock and spruce logs up to 36 inches in diameter cut in domestic mills; and be it

"FURTHER RESOLVED that copies of this resolution be transmitted to the Honorable William A. Egan, Governor of Alaska; the Commissioner of Natural Resources; and to the Director of the Division of Lands."

**POLICY STATEMENT OF GOVERNOR WILLIAM
EGAN (1962) (EXHIBIT 4 TO AFFIDAVIT OF
JAMES N. WANAMAKER, FILED OCT. 16, 1980)**

The 1962 policy statement of Governor Egan following the Logan Resolution was as follows:

"It is the policy of the State of Alaska to manage the State's forests on a sustained yield basis; to protect existing industries; to provide for the establishment of new industries, and to derive revenue from all timber resources.

"The policy of the State of Alaska relative to the export and primary manufacture of timber, within the definition contained in Department regulations, is as follows:

"1. Primary manufacture, as defined by Department regulations, will be required for all Sitka Spruce, White Spruce and Western Hemlock; however, squared Hemlock and Spruce logs up to 36 inches in diameter cut in domestic mills may be exported.

"2. Cottonwood, Cedar, Aspen, and Birch, *may be exported* in the form of round logs with advance approval of the Director, Division of Lands, when supply exceeds that required by local industries, but is within the total allowable annual cut in an established management area. The State may permit the export of round logs of such species for a period of five years beginning on May 1, 1962, and ending on May 1, 1967. Upon conclusion of the five-year period, primary manufacture will be required."

**POLICY STATEMENT OF GOVERNOR WALTER
HICKLE (1968) (EXHIBIT 5 TO AFFIDAVIT OF
JAMES N. WANAMAKER, FILED OCT. 16, 1980)**

POLICY STATEMENT ON PRIMARY MANUFACTURE**Section 406.104 "Timber Sale Regulations"**

Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips made from timber processing wastes shall be considered to have received primary manufacture and export will be permissive on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only, e.g. to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 406.104 of the "Timber Sale Regulations" and supercedes all previous policy statements and/or resolutions.

April 8, 1968

**POLICY STATEMENT OF GOVERNOR WILLIAM
EGAN (1974) (EXHIBIT 5 TO AFFIDAVIT OF
JAMES N. WANAMAKER, FILED OCT. 16, 1980)**

POLICY STATEMENT ON PRIMARY MANUFACTURE**Section 76.130, "Timber Sale Regulations"**

Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Timber processing wastes from west of 141° Longitude when manufactured into chips are considered to have received primary manufacture and may be exported. Timber processing wastes from east of 141° Longitude in Southeast Alaska when manufactured into chips are considered to have received primary manufacture and export may be permissive only on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue, or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only; e.g., to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 76.130 of the "Timber Sale Regulations" and supersedes all previous policy statements and/or resolutions.

/s/ William A. Egan
WILLIAM A. EGAN
Governor of Alaska

DATE: May 7, 1974

**NOTICE OF TIMBER SALE (EXHIBIT 7 TO
AFFIDAVIT OF JAMES N. WANAMAKER, FILED
OCT. 16, 1980)**

**STATE OF ALASKA DEPARTMENT OF NATURAL
RESOURCES DIVISION OF FOREST, LAND AND WATER
MANAGEMENT**

NOTICE OF TIMBER SALE

**Timber Sale SC-557 ADL 203002
Icy Cape No. 2**

Under the authority of AS 38.05.110-.120, the State of Alaska, Division of Forest, Land and Water Management, South-central District, 941 East Dowling Road, Anchorage, Alaska will sell at an oral auction at 2:00 PM October 23, 1980 at the above address the following described timber;

All timber designated for cutting within the protracted Section 32, 33, and 34, Township 21 South, Range 19 East, Copper River Meridian, Sections 1, 2, 3, 4, 5, 11, and 12, Township 22 South, Range 19 East, Copper River Meridian. Sections 6, 7, and 8, Township 22 South, Range 20 East, Copper River Meridian. There are approximately 1,028 acres of cutting area in eight cutting units. An estimated 34,612 MBF of Spruce and 14,573 MBF of Hemlock will be offered. The cutting and removal of timber shall be carried out in compliance with Forest Resources and Practices Act (AS 41.17.010 et seq) and regulations under that act which may be subsequently adopted, and the timber sales regulations (11 AAC 76.005-.385 and 76.600-76.610) in effect at the time of sale.

The contract shall be a new, Division of Forest, Land and Water Management timber sale contract with special provisions added to cover conditions pertinent to this sale. The state reserves the right to reject any and all bids or to award the timber for the amount of the next high bid to the next highest bidder if the director considers the highest bidder unqualified to fulfill the requirements of the contract or if the contract is not executed by the highest bidder. The deposit furnished by a high bidder whose bid was declared acceptable shall be retained as liquidated damages if the high bidder does not execute the contract and furnish a satisfactory bond within 30

days of receipt of the contract for execution, except as provided in Section 11 AAC 76.080(b) of the Timber Sales Regulations. The state reserves the right to waive minor technical defects in this advertisement.

No bids will be accepted for less than \$240.00 per thousand board feet of spruce and \$3.00 per thousand board feet of hemlock for a total consideration of \$8,306,880.00 for spruce and \$43,718.00 for hemlock. The total price consideration includes the weight price of sawlogs and utility logs. Primary manufacture within the State of Alaska will be required as a special provision of the contract. The term of the contract will be five years.

To qualify for oral bidding, bidders must submit a bid deposit of \$836,000.00 either in cash, certified check, cashier's check, money order, or any combination of these, in favor of the State of Alaska, Department of Revenue. The bid deposits shall be submitted to the selling agent prior to 2:00 PM prevailing time on October 23, 1980 at the Southcentral District Office, 941 East Dowling Road, Anchorage, Alaska 99502. All bidders must have proof of a current applicable State of Alaska Business License at the time of bidding. If the bidder is bidding as an agent for an individual, partnership, corporation or other legally established firm, the bidder must submit with the bid deposit written authorization of such agency.

The Contract, prospectus, maps, appraisal, cruise report and further information can be obtained from the Alaska Division of Forest, Land and Water Management at: Southcentral District Office, 941 East Dowling Road, Anchorage, Alaska 99502, Telephone 349-4524; Southeast District Office, Pouch M, Juneau, Alaska 99801, Telephone 465-2433, or the State Foresters Office, 323 East 4th Avenue, Anchorage, Alaska 99501, Telephone 279-5577. Northcentral District Office, 4420 Airport Way, Fairbanks, Alaska 99701, Telephone 479-2243.

/s/ Theodore G. Smith

THEODORE G. SMITH, Director

Division of Forest, Land and Water Management

Publish: September 8, 15, 22 and 29, 1980

AFFIDAVIT OF DAVID E. WALLINGFORD
(FILED OCT. 20, 1980)

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State of Alaska

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Anchorage, Alaska 99501
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Attorneys for Defendant
State of Alaska Officials

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action No. 80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and
THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,
Defendants.

RECEIVED
80 OCT 20 P1:18
WANAMAKER AND
DEVEAU

AFFIDAVIT OF DAVID E. WALLINGFORD

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

DAVID E. WALLINGFORD, being first duly sworn deposes and states as follows:

1. I am Assistant State Forester in the State of Alaska Department of Natural Resources.
2. I am familiar with the proposed Icy Bay No. 2 Timber Sale. I have been involved in the administrative process of planning and implementing the sale from its inception over a year ago.
3. Over the last year numerous State employees representing four different departments of State government have been actively involved to varying degrees in the process of planning and implementing the Icy Cape No. 2 sale. The following personnel have been involved in planning and implementing the sale: 12-14 employees of the Division of Forest, Land and Water Management of the Department of Natural Resources (DNR); 2 employees from the Division of Parks (DNR); 2 employees from the Commissioner's staff DNR; 6 employees of the Department of Fish and Game; 1 employee of the Department of Environmental Conservation and 1 Assistant Attorney General.
4. The Final Finding attached to this affidavit explains the reasons why the State decided to offer the Icy Cape No. 2 Timber Sale and the considerations underlying the finding that holding the sale at this time is in the best interest of the State. Basically, the economic and employment implications caused by the current timber shortage resulting from suspension of timber sales on federal lands has lead the State to commit a portion of its timber resource at Icy Bay to a 1980 timber sale.

5. The Office of the Division of Forest, Land and Water Management, 423 East Fourth Avenue, Anchorage, maintains a mailing list of potential interested bidders. The mailing of pre-sale information to approximately 20 parties on this list, including the prospectus and the timber sale contract, was completed by September 12, 1980. At least four prospective bidding parties who received the mailing have contacted the office for additional information indicating specific interest in the proposed Icy Cape No. 2 Sale.

6. I have read the Affidavit of James Wanamaker filed in this case. Mr. Wanamaker's affidavit omits the following facts:

(a) Mr. Wanamaker was one of only two potential bidders who received the initial prospectus (version No. 1) prior to the time that the State amended the prospectus to reflect the contract term regarding method of payment. Only the amended prospectus was sent to parties on the mailing list.

(b) Prior to mailing the amended prospectus and the timber sale contract to Mr. Wanamaker on September 12, 1980, Pierre Authier of my office notified Mr. Wanamaker by phone that the prospectus was amended to reflect the contract terms regarding payment.

7. To the best of my knowledge, South-Central Timber Development, Inc., the plaintiff in this case, is the only prospective bidder, out of all the parties who have received information on this sale, to complain that the sale should be cancelled or postponed because of alleged errors and dissatisfaction with contract terms.

8. Harvest operations will not commence under this contract until summer 1981, at the earliest, due to weather conditions which will preclude the new purchasers in this sale from moving equipment into the sale area and constructing roads as required under the contract until April 1981.

9. Since the contract requires reappraisal of the timber annually, beginning in February 1981, it is highly unlikely that

any substantial volume of timber will be harvested prior to the effective date of the first reappraisal. Current applicable cost data will be used in the reappraisals.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 20th day of October, 1980.

/s/ David E. Wallingford

DAVID E. WALLINGFORD

Subscribed and sworn to before me this 20th day of October, 1980.

/s/ Nina S. Bufi

NINA S. BUFI

Notary Public in and for Alaska

My Commission expires: 3/31/83

The undersigned hereby certifies that on the 20th day of October, 1980, the attached documents were hand carried to the attorneys of record.

Shelley J. Higgins

SHELLEY J. HIGGINS

Subscribed and sworn to before me
the date last written

Nina S. Bufi

NINA S. BUFI

Notary Public

My Commission expires 3/31/83

FINAL FINDING

The intent of the Division of Forest, Land and Water Management is to offer by competitive timber sale 44 million board feet of Sitka Spruce and Western Hemlock involving commercial forest land in the Icy Bay/Cape Yakataga area.

The following written finding is intended to satisfy the legal requirements of AS 38.05.035 (a)(14) with respect to the disposal of these timber resources, being in the best interest of the state. In making this determination, the Division has considered the following:

1. Public and interagency input received under AS 38.05.305 and public meetings held in Seward and Anchorage on November 29th and 30th, 1979.
2. Estimated Allowable Cut for Alaska's Timber Resource on State Lands Report (revised 1973), Division of Lands, Department of Natural Resources.
3. Cultural Resources Survey-Icy Bay to Cape Suckling, Gulf of Alaska; Office of History and Archaeology, Division of Parks, May 8, 1980.
4. Report of Preliminary Reconnaissance of the Yakataga and Icy Bay area concerning the proposed Icy Bay No. 2 sale. Division of Forest, Land and Water Management, Southcentral District, September 15, 1979.
5. Proposed Icy Bay No. 2 Timber Sale Analysis, Division of Forest, Land and Water Management, Southcentral District, October 29, 1979.

The primary issues raised in the above and pertinent to this finding were:

Issue

The Icy Bay No. 2 contract shall include the requirement for primary manufacturing.

Finding

Primary manufacture will be required when necessary to assure a continuing supply of timber for existing industry.

The State of Alaska is currently heavily dependent on nonrecurring sources of revenue to pay its expenses. Ninety percent of revenues are derived from petroleum, most of which are from Prudhoe Bay. The State began oil and gas leasing in the early 1960s to develop revenues to (1) pay for government services and (2) to be translated into recurring revenue-sources to maintain state solvency over the long run. For a more detailed history, see the Finding and Decision under AS 38.05.035(a)(14) for the Beaufort Sea Oil and Gas Lease Sale dated October 25, 1979.

The forest products industry of the State represents a source of recurring revenues as it is based upon a renewable resource. It is in the State's interest to maximize revenues and other benefits from selling its commercial forest resources by providing opportunities for economic returns beyond simply selling round logs for export. The primary manufacturing requirement is a means of providing such opportunities.

Economic and employment implications caused by the timber shortage resulting from the suspension of timber sales on the Tongass and Chugach National Forests pending the outcome of (d)(2) and RARE II, has led the division to determine that it is in the public's interest to commit a portion of timber in the Icy Bay/Cape Yakataga area to a 1980 timber sale. For the state to assist existing industry during this temporary shortage of volume from federal lands, the Director has determined that the Governor's Policy Statement of Primary Manufacture dated May 7, 1974, intended to define and clarify 11 AAC 76.130 shall apply in this case.

Issue

The ability of the Yakataga area to sustain a timber harvest increase of 10 million board feet over the next five years.

Finding

The state-owned timber base in the Icy Bay/Cape Yakataga area is not sufficient to sustain a perpetual annual harvest if the annual cut is to be large enough to support an economic operation. The remaining forest base between Icy Bay and Cape Yakataga would allow only 10 more years of harvesting while protecting other resources. As a

result, the Division must review the entire timber base available (Icy Bay to Cape Suckling) even though this additional state land has not been classified for state retention presently. Existing inventory data obtained for the entire area of state land indicates that some 25,000 acres of commercial forest land exists with an annual allowable cut of 25 million board feet over a 100 year rotation for Sitka spruce and western hemlock. Viewing the entire area as a forest reserve the commercial forest land base does have the ability to sustain this timber harvest increase. The decision to continue harvesting this renewable resource was directed by the Governor with supplemental operating appropriations passed by the 1980 legislature specifically for this sale reflecting their interest in having this harvest operation available to the states forest industry.

The Forest Resources and Practices Act Section 41.17.060 (b)(c) which sets out the standards by which timber harvest can take place on state lands has been adhered to in the absence of approved regulations. Once adopted, the Forest Practice Act Regulations will be part of the sale contract, to ensure continuous growing and harvesting of commercial forest species under sound forest practices.

Issue

The compatability of the proposed timber sale with adequate protection for area wildlife.

Finding

Through joint meetings held with the Alaska Department of Fish and Game earlier in the year and two weeks of field work during March recommendations by the Department of Fish and Game (memo of May 2, 1980) concerning fish stream crossings, gravel sources, mountain goat habitat and ingress-regress leave strips for bear inhabitants were formulated. These stipulations worked out between the Division of Forest, Land and Water Management and the Department of Fish and Game update recommendations of earlier Department of Fish and Game memo's and provide reasonable protection to all fish wildlife resources and values present in that area.

Issue

Commercial timber harvest activities in the coastal area must be conducted so as to meet Coastal Zone Management regulations.

Finding

Pursuant to 6 AAC 80.010 (b), the Governor's Administrative Order No. 54 and the Department Order 81/003, the Department of Natural Resources had reviewed the proposed Icy Bay Timber Sale No. 2 for consistency with the Alaska Coastal Management Program (ACMP). The department finds the sale as proposed under the terms of the applicable contract to be consistent with ACMP. The applicable standards of the ACMP and the proposed contract conditions and stipulations which render this timber sale consistent with the ACMP are discussed below:

6 AAC 80.010 - COVERAGE OF CHAPTER

This standard requires the timber sale to be consistent with applicable district programs and the ACMP standards contained in Chapter 6 AAC 80. There is no district (local) coastal management program with jurisdiction over the timber sale area. The city of Yakutat is preparing a coastal management program which, when adopted, may contain recommendations affecting the sale area. Once the local program is adopted by the Coastal Policy Council it will become part of the state regulations. Prospective timber purchasers are required to comply with applicable regulations by section 49 of the sales contract.

6 AAC 80.040 - COASTAL DEVELOPMENT

This standard requires that in planning for and improving development in coastal areas, state agencies shall give priority to (1) water dependent uses and activities, (2) water related uses and activities, and (3) uses and activities that are neither water dependent nor water related for which there is no feasible or prudent inland alternative to meet the public need for the use or activity. This standard also provides that the placement of structures and the discharge of dredged or filled materials into coastal water must, at a minimum, comply with the standards contained in Parts 320-323, Code of Federal Regulations.

These timber resources are located in the coastal area. The major road and harvest unit locations are designed to leave a 400 foot buffer strip along the coast. Any road changes or additions as well as the location of support facilities by the purchaser must be approved by the state. (Sec. 21 of the contract).

The state has applied for a Corps of Engineers permit for the log* dump. (Application date February 5, 1980, NPACP #071-OYD-1-800021). Comments on the application by the Alaska Department of Fish and Game (ADF&G) indicate they found the proposed log dump consistent with the ACMP.

6 AAC 80.050 - GEOPHYSICAL HAZARDS

This standard requires that the state decision makers not approve development in known geophysical hazard areas until siting, design and construction measures for minimizing property damage and protecting against loss of life have been provided. The road locations selected by the state as well as the road, bridge, and culvert construction specifications the purchaser must follow are designed to minimize loss of life and property due to the known soils and flood hazards in the area (Sec. 75 of the contract). Other improvements constructed by the purchaser must be approved by the state (Section 15 of the contract). It is most appropriate to specify design standards to protect against loss of life and property due to geophysical hazards during the approval process required under section 15 of the contract.

6 AAC 80.060(b) - RECREATION

This standard requires state agencies to give high priority to maintaining and, where appropriate, increasing public access to coastal waters. Roads constructed pursuant to this timber sale are public rights-of-way. Access within this coastal area will be increased.

6 AAC 80.080 - TRANSPORTATION AND UTILITIES

This standard requires that transportation and utility routes and facilities in the coastal area be sited, designed and constructed so as to be compatible with district programs, and that transportation and utility facilities be sited inland from beaches and shorelines unless the route

or facility is water dependent or no feasible and prudent inland alternative exists to meet the public need for the route or facility.

The major road network and stream crossings have been located through a joint DNR and Alaska Department of Fish and Game effort. The road locations avoid the immediate coastal area which is protected by a 400 feet buffer. Roads are permitted to extend to tidewater to reach facilities for loading logs on barges. Roads are only located on beaches when this is the best place to locate a river crossing. The purchaser must construct roads within the locations selected by the state. Any additional roads desired by the purchaser must be approved by the state prior to construction (Sections 12 and 21 of the contract).

6 AAC 80.100 - TIMBER HARVEST AND PROCESSING

It is the Department of Natural Resources' understanding that the forthcoming forest resources and practices regulations (11 AAC 96) are intended to replace the standards contained in 6 AAC 80.100. The Icy Bay Timber Sale No. 2 has been designed and the purchaser will be required to comply with the provisions in the forthcoming regulations.

6 AAC 80.120 - SUBSISTENCE

The state agencies are required to recognize and assure opportunities for subsistence usage of coastal areas and resources. The sale area has not been identified as a major area for subsistence usage.

6 AAC 80.130 - HABITATS

This standard lists habitats which are subject to the ACMP and provides standards for management of the listed habitats. The location of roads, stream crossings, cutting unit boundaries and buffer zones for this timber sale were made through a joint Department of Natural Resources and Department of Fish and Game effort. Measures taken to protect the habitats are listed by habitat below:

1. **Estuaries:** A Corps of Engineers permit and multi-agency review of the location and conditions of the log dump and loading facilities is underway. Other estuary areas are avoided.

2. Wetlands and tideflats: See estuary comments.
3. Exposed high energy coast: A 400 feet buffer area is maintained along the coast.
4. Rivers, streams and lakes: Stream crossing locations and construction specifications have been approved by the Alaska Department of Fish and Game. Buffer strips are left along the rivers and streams as requested by ADF&G (April 30, 1980, Regional Supervisor—Rick Reed). Section 68 Stream Protection of the contract specifies procedures to protect streams.
5. Important upland habitat: The winter range for goats is the most often cited important upland habitat in the sale area. Logging operations are not allowed above the 400 foot contour and cutting unit boundaries were modified to protect areas identified by ADF&G as winter range for goats below the 400 foot contour.

6 AAC 80.140 - AIR, LAND AND WATER QUALITY

This standard requires activity to comply with existing regulations on air and water quality. The request for a Corps of Engineers permit for the log dump has been reviewed by the Department of Environmental Conservation and a statement of water quality compliance has been made. (May 22, 1980 Deputy Commissioner C. Deming Cowles). The purchaser will also have to meet any standards applicable to his operations (section 49 of the contract).

6 AAC 80.150 - HISTORIC, PREHISTORIC AND ARCHAEOLOGICAL RESOURCES

The Division of Parks and the State Historic Preservation Officer concluded that there are no known cultural resources and no further investigation is necessary in the Icy Bay Timber Sale No. 2 area. (May 8, 1980, Greg Dixon Archaeologist).

The findings presented above have been reviewed and considered. The case file has been found to be complete. The requirements of all applicable statutes and regulations have been satisfied. Therefore, it is the finding of the Director, that

it is in the best interest of the state to approve this action under the authority of AS 38.05.035 (a)(14) and AS 38.05.120.

Date: 9/5/80

/s/ Theodore G. Smith

THEODORE G. SMITH, Director
Forest, Land and Water Management
Department of Natural Resources

**DEFENDANTS' ANSWER TO PLAINTIFF'S
COMPLAINT
(FILED NOV. 5, 1980)**

Wilson L. Condon
Attorney General
State of Alaska

Shelley J. Higgins
Assistant Attorney General
420 L Street, Suite 100
Anchorage, Alaska 99501
(907) 276-3550

Attorneys for Defendant
State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

A80-311 Civil

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and

THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,
Defendants.

RECEIVED
NOV-6 1980
Burr, Pease & Kurtz, Inc.

STATE DEFENDANTS' ANSWER TO COMPLAINT

Defendants, officials of the State of Alaska, Department of Natural Resources, through counsel, answer the Complaint in this action as hereafter set forth.

FIRST DEFENSE

This Court lacks subject matter jurisdiction over the claims stated in paragraphs 15(B), (C), 16, 17, 18, 19, and 20 for the reason that such claims do not raise a federal question.

SECOND DEFENSE

The Eleventh Amendment to the United States Constitution bars maintenance of the above-referenced claims in federal court against the State of Alaska and the defendant state officials.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

Responding to the numbered allegations of the Complaint, the State answers as follows:

1. The allegations of paragraph 1 are conclusions of law which require no response. However, defendants specifically deny that all of the claims in this action arise under the Constitution of the United States, Article I, Section 8.

2.-12. The allegations of paragraphs 2 through 12 are admitted.

13. The allegations of paragraph 13 are admitted subject to the clarification that primary manufacture of logs removed by plaintiff from the Icy Cape No. 1 Timber Sale is not presently required due to a January, 1979, modification of the timber sale contract which waived the original contract term which required primary manufacture.

14. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15. The allegations of sub-paragraph 15(A) are denied. The allegation of sub-paragraph 15(B) is denied and, moreover, the defendants assert by way of affirmative defense that this Court lacks jurisdiction over the claim stated in this sub-paragraph. The allegation of sub-paragraph 15(C) is denied and the defendants allege by way of affirmative defense that the allegations of this sub-paragraph fail to state a claim.

16. The allegation of paragraph 16 is denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claims stated in this paragraph.

17. The allegation of paragraph 17 is denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claims stated in this paragraph and, furthermore, this paragraph fails to state a claim upon which relief can be granted.

18. The allegations of paragraph 18 are denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claim stated in this paragraph.

19. The allegations of paragraph 19 are denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claim stated in this paragraph.

20. The allegations of paragraph 20 are denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claim stated in this paragraph.

21. The allegations of paragraph 21 are denied and the State defendants allege by way of affirmative defense that this Court lacks jurisdiction over any claim stated in this paragraph.

22. The allegations of paragraph 22 are admitted.

23. The defendants admit that plaintiff has at the present time only one state timber sale contract (the Icy Cape No. 1 Timber Sale) on which it is conducting logging operations and that it is expected that the Icy Cape No. 1 Timber Sale contract will be finished in two or three operating seasons. The defendants are without knowledge or information sufficient to form a

belief as to the truth of the allegation that plaintiff will face the prospect of having to cease logging operations by reason of the unavailability of timber unless it is permitted to bid on the Icy Cape No. 2 timber sale. The State defendants specifically deny the further allegation that plaintiff will suffer irreparable harm unless the sale is enjoined.

24.-26. The allegations of paragraphs 24 through 26 are denied.

27. The allegations of paragraph 27 are conclusions of law which require no response. However, the defendants specifically deny that in the event that this Court concludes that the sale term of primary manufacture is unconstitutional and the State decides not to re-offer the sale without the primary manufacture requirement, cancellation of the sale would in any way punish plaintiff for insisting upon its constitutional rights. Furthermore, defendants assert that this Court would have no legal grounds or power to order defendants to continue the proceedings for the Icy Cape No. 2 timber sale and to require the State to hold the sale without the primary manufacture requirement.

WHEREFORE, defendants pray that:

1. This complaint be dismissed.
2. That defendants recover their costs and attorneys fees incurred in defending this action.
3. That defendants recover the full cost of cancelling and rescheduling the sale from the bond submitted by plaintiff in connection with the temporary restraining order.

DATED this 5th day of November, 1980.

Respectfully submitted,

**WILSON L. CONDON
ATTORNEY GENERAL**

**By: /s/ Shelley J. Higgins
SHELLEY J. HIGGINS
Assistant Attorney General**

**STATE OF ALASKA HOUSE OR
REPRESENTATIVES RESOLUTION NO. 3 (1979)
(EXHIBIT A TO MEMORANDUM OF
SOUTH-CENTRAL TIMBER DEVELOPMENT IN
SUPPORT OF SUMMARY JUDGMENT MOTION,
FILED NOV. 18, 1980)**

STATE OF ALASKA
HOUSE OF REPRESENTATIVES
1979

Source

House
Resolve No.
3

HR 5

Relating to an amendment to the Icy Cape No. 1 timber sale, contract number SC-182, permitting exportation of round logs.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

WHEREAS the Alaska Department of Natural Resources let a timber sale contract in Icy Cape in 1969 which specifically prohibited the exportation of round logs as a marketable commodity; and

WHEREAS, as a result of state policy requiring primary manufacture of timber in the state, several sawmills in Alaska have established sawmill operations suitable for primary manufacture of timber; and

WHEREAS people who work in these sawmills are permanent members of their communities, and the sawmills are an integral part of the economies of the communities in which they are located; and

WHEREAS in January, 1979 the state amended the Icy Cape No. 1 timber sale contract, waiving the requirement of primary manufacture of logs in the state contrary to its stated policy; and

WHEREAS waiving of the primary manufacture requirements for timber harvested in Alaska will create great hardships not only for those people who will be unemployed with the closing of the sawmills which depend on primary manufacturing of logs, but also for the affected communities which will lose an economically viable industry; and

WHEREAS the findings made by the Department of Natural Resources which brought about the waiver of

primary manufacture appear to discriminate in favor of the company holding the timber sale contract; and

WHEREAS wilderness proposals under RARE II and pending (d)(2) legislation will most likely reduce the availability of timber in Alaska from other sources;

BE IT RESOLVED by the House of Representatives that the amendment which waived primary manufacture in the Icy Cape No. 1 timber sale is not in the best interests of the state and its citizens, and be it

FURTHER RESOLVED that round logs from the Icy Cape timber sale contract continue to be made available under the timber sale contract to those sawmills in the state which are capable and willing to process these logs into lumber to provide local employment as well as building materials for the Alaska market; and be it

FURTHER RESOLVED that the House of Representatives respectfully requests the Governor to direct the Department of Natural Resources to reevaluate the amendment waiving primary manufacture of timber in the state giving due consideration to all parties who would be adversely affected by permitting export of round logs.

**SENATE RESOLUTION NO. 9 (1979) (EXHIBIT B
TO MEMORANDUM OF SOUTH-CENTRAL
TIMBER DEVELOPMENT IN SUPPORT OF
SUMMARY JUDGMENT MOTION, FILED NOV.
18, 1980)**

**STATE OF ALASKA
SENATE
1979**

Source

Senate
Resolve No.
9

SR 6

Relating to an amendment to the Icy Cape No. 1 timber sale, contract number SC-182, permitting exportation of round logs.

BE IT RESOLVED BY THE SENATE:

WHEREAS the Alaska Department of Natural Resources let a timber sale contract in Icy Cape in 1969 which specifically prohibited the exportation of round logs as a marketable commodity; and

WHEREAS, as a result of state policy requiring primary manufacture of timber in the state, several sawmills in Alaska have established sawmill operations suitable for primary manufacture of timber; and

WHEREAS people who work in these sawmills are permanent members of their communities, and the sawmills are an integral part of the economies of the communities in which they are located; and

WHEREAS in January, 1979, the state amended the Icy Cape No. 1 timber sale contract, waiving the requirement of primary manufacture of logs in the state contrary to its stated policy; and

WHEREAS waiving of the primary manufacture requirements for timber harvested in Alaska will create great hardships not only for those people who will be unemployed with the closing of the sawmills which depend on primary manufacturing of logs, but also for the affected communities which will lose an economically viable industry; and

WHEREAS the findings made by the Department of Natural Resources which brought about the waiver of primary manufacture appear to discriminate in favor of the company holding the timber sale contract; and

WHEREAS wilderness proposals under RARE II and pending (d)(2) legislation will most likely reduce the availability of timber in Alaska from other sources;

BE IT RESOLVED by the Senate that the amendment which waived primary manufacture in the Icy Cape No. 1 timber sale is not in the best interests of the state and its citizens; and be it

FURTHER RESOLVED that round logs from the Icy Cape timber sale contract continue to be made available under the timber sale contract to those sawmills in the state which are capable and willing to process these logs into lumber to provide local employment as well as building materials for the Alaska market; and be it

FURTHER RESOLVED that the Senate respectfully requests the Governor to direct the Department of Natural Resources to reevaluate the amendment waiving primary manufacture of timber in the state giving due consideration to all parties who would be adversely affected by permitting export of round logs.

**AFFIDAVIT OF H. SUGIYAMA (FILED NOV. 18,
1980)**

WANAMAKER, DEVEAUX & CRABTREE
A PROFESSIONAL CORPORATION
909 W. 9th Ave., #140
Anchorage, Alaska 99501
(907) 279-6591

Attorneys for Plaintiff

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and

THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,

Defendants.

AFFIDAVIT OF H. SUGIYAMA

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

COMES NOW H. SUGIYAMA, and being first duly sworn,
deposes and states as follows:

1. That I am the Vice President of SOUTH-CENTRAL
TIMBER DEVELOPMENT, INC. (hereinafter "SOUTH-
CENTRAL").

2. That SOUTH-CENTRAL has its principal offices at 255 E. Fireweed Lane, Anchorage, Alaska. Since 1967 SOUTH-CENTRAL has been engaged within the State of Alaska in the business of purchasing standing timber, providing for the logging and preparation of such timber, and exporting the timber in foreign commerce to Japan.

3. SOUTH-CENTRAL also has a branch office in Portland, Oregon. From that office, purchases of logs are made from suppliers in Washington, Oregon, and British Columbia and those logs are exported in foreign commerce to Japan.

4. That I was present in the Courtroom of Judge von der Heydt on October 20, 1980, at the time the MOTION FOR TEMPORARY RESTRAINING ORDER was argued.

5. At that time I heard the arguments of the STATE Defendants to the effect that the sale should be allowed to proceed and SOUTH-CENTRAL could then bid in the sale, and if it wished to challenge primary manufacture, could then file suit challenging said primary manufacture requirement.

6. This possible course of action has been evaluated by me in my capacity as Vice President of SOUTH-CENTRAL. The evaluation has included study of the "Prospectus - Icy Cape No. 2" attached as Exhibits to the AFFIDAVIT OF JAMES N. WANAMAKER and the "Icy Cape No. 2 Timber Sale Contract" attached hereto as Exhibit A (for this purpose only the principal legal provisions are reproduced and the voluminous maps, diagrams, and technical provisions attached to the contract have not been included).

7. In the process of such analysis, I came to the following conclusions as set forth in this affidavit:

A. That as a preface to bidding on Icy Cape No. 2 Timber Sale it would be necessary to make a cash deposit of \$836,000. (See Prospectus.)

B. That the Prospectus provides that the \$836,000 will be forfeited if the proposed Icy Cape No. 2 contract is not signed.

The exact words are found at page 4 of the Prospectus as follows:

"The deposit furnished by the successful bidder whose bid was declared acceptable shall be retained as liquidated damages if the successful bidder does not execute the contract and furnish satisfactory bonds within 30 days of receipt of contract."

C. That if the Icy Cape No. 2 Timber Sale Contract were signed by SOUTH-CENTRAL, it would surely then be argued that SOUTH-CENTRAL had waived its argument against primary manufacture. Also, this step would increase SOUTH-CENTRAL's exposure since it would be necessary to post a Performance Bond of \$836,000 as a part of signing the contract. (See Prospectus and Section 8 of Contract.)

D. Also, it is my evaluation that the STATE OF ALASKA could insist that a challenge to primary manufacture after contract signing would be a failure to abide by contract terms of Icy Cape No. 2 Contract, thereby exposing the Performance Bond to being drawn upon. (Section 8 of Contract.)

E. Thus, it is my overall evaluation that by following the plan of bidding in the timber sale and then suing to remove the primary manufacture requirement, SOUTH-CENTRAL would expose the corporation to the potential loss of the \$836,000 cash deposit, on the one hand, or the argument of waiver and proceedings under the \$836,000 Performance Bond, on the other hand.

8. I reasonably believe that a deposit with the STATE OF ALASKA of \$836,000 would be placed in the General Fund of the STATE and thus beyond the control of this Court, it being the case that the Federal Court has jurisdiction only over Officers of the STATE and not over the STATE itself.

9. SOUTH-CENTRAL has been a small but healthy company over its 13 years of legal existence. It is not, however, sufficiently wealthy to risk the total loss of the cash deposit of \$836,000 or proceedings against its \$836,000 Performance Bond, if posted. This would be an unacceptably severe financial burden to the company.

10. Thus, the concept of bidding on the Icy Cape No. 2 Timber Sale Contract and then suing to enjoin primary manufacture is beyond the financial reach of SOUTH-CENTRAL.

11. If this Court should permit that the Icy Cape No. 2 Timber Sale could continue as first noticed and with primary manufacture required, economics would prohibit SOUTH-CENTRAL from bidding in the contract and suing.

12. I have evaluated the prospect of establishing a method of waste disposal for the sawdust and slabs which would result from a resumption of the primary manufacture slabbing process at SOUTH-CENTRAL's Jakalof Bay mill. I have concluded that there is no system of waste disposal which would meet Alaska environmental requirements which could be installed and amortized within the 49 million board foot volume of the Icy Cape No. 2 Timber Sale.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 18th day of November, 1980.

/s/ H. Sugiyama
H. SUGIYAMA

SUBSCRIBED and SWORN to before me this 18th day of November, 1980.

/s/
Notary Public for Alaska
My commission expires:

**ICY CAPE NO. 2 TIMBER SALE CONTRACT
(EXHIBIT TO AFFIDAVIT OF H. SUGIYAMA,
FILED NOV. 18, 1980)**

ICY CAPE NO. 2 TIMBER SALE CONTRACT

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Exhibits

ADL No. 203002

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FOREST, LAND AND WATER MANAGE-
MENT

Timber Sale Contract No. -SC 557
Timber Sale Name-Icy Cape No. 2

This contract, made and entered into duplicate this ____ day of ____ by and between the STATE OF ALASKA - DEPARTMENT OF NATURAL RESOURCES, by and through the Director, Division of Forest, Land and Water Management, hereinafter called "STATE," and

hereinafter called "PURCHASER," which parties do hereby agree as follows:

Section 1. Incorporation of Full Terms and Conditions.
This contract incorporates and is inclusive of all terms and conditions between the parties hereto, either oral or written, expressed or implied, relating to the subject matter of the contract.

Section 2. Regulations—Exhibits.

(a) The State Timber Sale Regulations in effect on the effective date of the contract are considered a provision of this contract and have the same effect and force as any other provision of this contract (11 AAC 76.135). Subsequent State Forest Resources and Practices Act (AS 41.17.010 et seq) Regulations shall be treated similarly.

(b) The following designated Exhibits, attached hereto, are by this reference made a part of this contract:

- (1) Exhibit "A".
- (2) Exhibit "B".
- (3) Exhibit "C".
- (4) Exhibit "D".

Section 3. Contract Modification. This contract can be modified only by written agreement of the parties.

Section 4. Sale of Timber. Under the terms and conditions of this contract, STATE hereby sells to PURCHASER, and PURCHASER hereby buys from STATE, that timber designated and described in Section 49 of this contract, which timber for all purposes of this contract is hereinafter referred to as "timber." The timber is located on the area or areas shown on Exhibit "A". PURCHASER shall pay STATE the purchase price for timber set forth in Section 50. PURCHASER shall pay the purchase price for timber to STATE in accordance with the payment schedule in Section 49 of this contract.

Section 5. Quantity—Quality of Timber. STATE makes no guarantee or warranty to PURCHASER as to the quantity or quality of the timber.

Section 6. Work to be Done. For all purposes of this contract, "work" shall be understood to mean the furnishing of all labor, materials, equipment, and other incidentals necessary or convenient to the successful completion of the project, duties and obligations, including slash disposal, imposed on PURCHASER by this contract.

Section 7. Duration of Contract. Time is of the essence of this contract, and PURCHASER shall complete and fully perform this contract within the time designated in Section 9, below, unless extended in accordance with Section 37, hereof; provided, however, that under Section 26, hereof, PURCHASER may be required to dispose of slash at a time later than set forth in Sections 9 or 37, hereof.

Section 8. Performance Bond. PURCHASER shall furnish STATE with a performance bond in the amount of _____ The bond shall guarantee complete compliance by PURCHASER with the terms and conditions of this contract, and the faithful performance of all obligations required of PURCHASER by this contract.

Section 9. Completion of Date of Contract. The completion date of this contract shall be _____

STANDARD PROVISIONS

SALE AREA — TITLE TO TIMBER

Section 10. Timber Sale Area. The timber is located on the timber sale area. For all purposes of this contract, "timber sale area" shall be understood to mean the area or the areas designated as such on Exhibit "A." The boundaries of the timber sale area are located by reference to legal subdivisions, monuments, natural land features, improvements or sale boundary signs, which references are designated on Exhibit "A."

Section 11. Title to Timber. The ownership of and title to the timber shall pass to PURCHASER from time to time as and when any of the timber is paid for, cut, and scaled. However, any right of PURCHASER to cut and remove the timber shall expire and end at the time this contract, or any extension thereof, terminates; and further, all rights and interests of PURCHASER, in and to the timber, and logs therefrom; remaining on the timber sale area at said time, shall at that time automatically revert to and revest in STATE, without compensation to PURCHASER.

Section 12. Right to Cut and Remove Timber. During the period of this contract, and any extension thereof, PURCHASER shall have the right to cut and remove the timber; provided, however, the right to cut and remove timber shall be conditioned upon PURCHASER complying with the provisions of this contract.

Section 13. Access. PURCHASER may use the primary or secondary roads shown or indicated on Exhibit "A" for access to the timber sale area. The use of said roads shall be limited to that use necessary in carrying out the terms and provisions of this contract. PURCHASER shall comply with all applicable terms and conditions of any access road easements or agreements set forth in the Special Provisions of this contract, which easements or agreements are by this reference made a part of this contract as if fully set forth herein. Except as is otherwise provided for in this contract, PURCHASER shall have the

right of access over, in and through the timber sale area for the purposes of cutting and removing the timber, or performing the work to be done; such right shall be inclusive of the use and improvement of existing roads, and the construction and use of new roads. STATE shall first approve any improvement or construction before the start of construction. PURCHASER in so using, improving or constructing such roads shall at no time have an interest in the land, other than said right of access.

EXAMINATION—WORK—MATERIALS

Section 14. Examination of Locations and Conditions. It is understood that PURCHASER, before signing this contract, has made a careful examination of all plans and specifications set forth in this contract; that PURCHASER has obtained full information as to the quality and quantity of materials and the character of the work required; and that PURCHASER has made a careful examination of the timber sale area and the location and conditions of work, including sources of supply for materials. STATE in no case will be responsible for any loss or cost that may be suffered by PURCHASER as a result of the failure of PURCHASER to be so informed.

Section 15. Permits—Licenses—Safety. PURCHASER shall procure all permits and licenses, pay all charges and fees, and give all notices necessary and incident to the due and lawful prosecution of the work unless otherwise approved in writing by STATE. In the performance of the work to be done under this contract, PURCHASER shall use every reasonable and practicable means to avoid damage to property and injury to persons. PURCHASER shall use no means or methods which will endanger, unnecessarily, either persons or property. The responsibility of PURCHASER stated herein shall cease upon the work being accepted as complete by STATE.

PURCHASER shall comply with the current "Logging and Sawmill Safety Code."

Section 16. Materials—Improvements. Title to materials, improvements and other property, required of PURCHASER by this contract, shall vest in and become the property of STATE at the time such are furnished by PURCHASER and accepted by STATE. Only materials, improvements and property free and clear of liens, claims and encumbrances shall be so furnished by PURCHASER. Existing improvements in the sale area, owned by STATE, may be used by PURCHASER in connection with this sale without further approval unless such use is limited or prevented elsewhere in this contract. Existing improvements when used by PURCHASER shall be kept in good repair. Any improvements or transportation facilities including sawmills, buildings, bridges, roads, etc. constructed by PURCHASER in connection with this sale and within the sale area or on other STATE land leased for the purpose must be authorized by, and must be in accordance with standard or special plans approved by STATE.

Section 17. Responsibility for Work. Before completion and final acceptance of work PURCHASER shall be held responsible for any injury or damage to the work or to any part thereof by action of the elements, or from any cause whatsoever, and PURCHASER shall make good all injuries or damages to any portion of the work.

Section 18. Final Inspection. Except as otherwise provided in the Special Provisions of this contract, STATE will make final inspection of work done by PURCHASER within 10 days after written notification to STATE by PURCHASER that the work is completed. If the work is not acceptable to STATE, then STATE will so advise PURCHASER in writing as to the particular defects to be remedied before final acceptance by STATE can be made.

Section 19. Materials from State Property. PURCHASER shall not take, sell, use, remove or otherwise dispose of any sand, gravel, rock, earth or other material obtained or produced from within the limits of rights of way, gravel pits, rock quarries or other property owned by or held by STATE, unless authorized by this contract or written consent of STATE.

Section 20. Prosecution of the Work. PURCHASER shall not commence work to be done under this contract until the contract has been fully executed.

LOGGING TIMBER SALE AREA

Section 21. Notification of Operation. At least 30 days before commencement of operations on the contract area PURCHASER shall notify STATE, in writing, of the date he plans to begin operation; PURCHASER shall also notify STATE, in writing, if he intends to cease operation for a period of 15 or more days.

Section 22. Annual Operating Plan. PURCHASER shall, prior to commencing any work, and prior to the start of operations each year thereafter, submit to STATE for review and approval an operating plan which shall be followed except as modified in writing. The Operating Plan shall be in writing and shall show:

- (1) Sale contract number and name.
- (2) Approximate date project work will commence.
- (3) Approximate date logging operations will commence.
- (4) Authorized representatives of PURCHASER, as required by Section 44.
- (5) Portions of the required project work or logging operations to be subcontracted, if any, and the names of such subcontractors as required by Section 41.
- (6) General location of spur roads not designated on Exhibit "A" which may be constructed pursuant to Section 13.
- (7) Location of tractor yarding roads, if approval of such by STATE is required in this contract.
- (8) Temporary stream crossings, where necessary to protect the watershed, as required by Section 27.
- (9) Location of landings and probable sequence of logging.

(10) Log brand or brands to be used on logs from the timber sale area.

PURCHASER shall log the timber sale area and construct the projects in a workmanlike and orderly manner using the methods and practices generally acceptable in the logging industry. The schedule of approximate starting dates and the sequence of logging may be subject to modification when necessitated by weather or other unpredictable circumstances, provided PURCHASER gives 15 days notice to STATE.

STATE will furnish PURCHASER additional copies of Exhibit "A" or other suitable maps which PURCHASER shall use for showing locations of work specified in (6), (7), (8) and (9) of this section.

STATE will, within a reasonable period of time acknowledge in writing to PURCHASER the receipt of the Operations Plan, and shall designate to PURCHASER the authorized field representative of STATE to be readily available to the area of construction and logging operations and to receive notices in regard to performance under this contract.

STATE will within a reasonable period of time of receipt of the Operations Plan review the plan and give to PURCHASER written notice of approval or disapproval.

When the Operating Plan contains information PURCHASER is required to furnish to STATE by other sections of this contract, written approval of the Operating Plan by STATE will constitute acceptance and approval of such information.

Any deviation from the approved plan must have prior written authorization from STATE and may require amendment of the approved plan. Authorization from STATE to deviate from the approved plan shall be requested in writing by PURCHASER. Unapproved deviation from the plan may be cause for suspensions of operations under this contract.

Section 23. Damage to Reserved Trees. For purposes of this section, "reserved trees" are those trees on the timber sale area, or on adjoining STATE property, which are not sold to or

are not to be cut by PURCHASER. If in connection with operations under this contract the PURCHASER, his contractors, subcontractors, or employees of any of them, cuts, injures, or removes any reserved trees, PURCHASER shall pay for such trees at rates determined by STATE as follows:

(1) Damage to reserved trees in the course of normal logging shall be paid for at the current contract rate.

(2) Damage to reserved trees caused by negligent or careless operations of PURCHASER shall be paid for at double the current contract rate.

(3) Repeated damage to reserved trees will be cause for suspension of this contract.

(4) Payment shall be made by PURCHASER within 10 days after written demand by STATE; provided, the payment for reserved trees shall not release PURCHASER from liability for other damage to the property of STATE.

Section 24. Monthly Report. On or before the 10th day of each month that this contract is in effect, PURCHASER shall provide STATE with a written report revealing the net board foot volume of timber removed from the timber sale area for the previous month. For recovery or scale sales, such report shall itemize by certificate number or ticket number the net scale volume of all logs, by species scaled during the preceding calendar month. All books and records relating to scale shall be kept in accurate and complete form by PURCHASER, and the same shall be available for the inspection of STATE or its representatives at all reasonable and convenient times and places.

Section 25. Slash Disposal. The term "slash" used in this contract means all debris resulting from logging operations, construction of roads or other improvements, or windthrow timber within the sale area. PURCHASER shall bunch slash in tractor-yarded areas as directed by STATE. PURCHASER agrees to treat or dispose other of slash as STATE may require, and at such times and in such manner as STATE may specify.

Section 26. Protection of the Watershed. PURCHASER shall take all practicable precautions to prevent damage to the soil, stream banks, and any stream course, lake or reservoir on or near the timber sale area, and to that end shall comply with Alaska laws and with regulations promulgated under the Forest Resources and Practices Act.

In addition to other protective measures required herein, PURCHASER shall discontinue all or part of the operations under this contract upon notice from STATE that due to weather conditions such operations will cause excessive damage to the watershed.

PURCHASER shall:

(1) Fell adjacent trees away from or parallel to the stream channel so that such trees do not fall or slide into the stream channel.

(2) Not operate tractors within 100 feet of streams, unless authorized in writing by STATE.

(3) Not cable-yard logs across streams unless approved by STATE in the Operating Plan.

Section 27. Safeguarding Improvements. All existing improvements located on or in the timber sale area, and, any improvements placed on or in the timber sale area by PURCHASER which become the property of STATE, shall be safeguarded by PURCHASER, and if injured or damaged by PURCHASER or by contractors of PURCHASER, shall be repaired as soon as possible to previously existing conditions by PURCHASER, without cost to STATE.

Section 28. Preservation of Markings and Monuments. PURCHASER shall not remove, alter, damage or destroy any signs, posters, land survey corners, witness trees, or corner reference tags pertaining to the timber sale or land survey. If PURCHASER unintentionally damages or disturbs any such markings or monuments, PURCHASER shall be immediately report that occurrence to STATE, and further damage or disturbance shall be prevented by PURCHASER. If PUR-

CHASER damages or disturbs any such markings or monuments, or fails to immediately report such to STATE, or completely destroys any land survey corner, PURCHASER shall re-establish such markings, monuments or corners at his expense to the standards prescribed by STATE.

In the event it is necessary, for the conduct of logging operations or road construction, to disturb any legal land survey corner, PURCHASER shall so notify STATE and shall not disturb such corner until PURCHASER has referenced or otherwise preserved the corner, in a manner acceptable to STATE.

Section 29. *Simultaneous Use of Area.* STATE reserves the right to issue written authorization to others to use the timber sale area or access roads thereto, provided, in the determination of STATE, such use will not materially interfere with the operations of PURCHASER. STATE further reserves the right to sell from the timber sale area during the period of this contract any products or materials not covered by the terms of this contract; provided that removal of such products or materials shall not materially interfere with the operations of PURCHASER. PURCHASER shall not unduly interfere with the use of roads by other authorized users. PURCHASER shall not be held liable for any acts, omissions or neglect of authorized simultaneous users.

Section 30. *Primary Road Maintenance.* If PURCHASER is the only user of the primary roads as shown or indicated on Exhibit "A," then PURCHASER shall perform all normal road maintenance, as defined in Section 31, which is made necessary by his use. If PURCHASER jointly uses the roads with other parties authorized under this contract, each shall be responsible for a proportionate part of the normal maintenance, based upon the ratio of each parties' use to total road use.

If STATE, during any period of this contract, cause any of the primary roads to be maintained by STATE equipment, through road maintenance contracts with independent contractors, or through agreement with third party users, then

PURCHASER shall pay to STATE or to the third party at the rates per thousand board feet, net scale, for all logs hauled by PURCHASER over such roads, as set forth in the special provisions of this contract. If STATE terminates the contracted or third party maintenance during the period of this contract, PURCHASER shall remain responsible for all normal maintenance of the roads, or for a proportionate part of the maintenance during periods of joint use with other authorized users.

Section 31. Maintenance Defined. Normal maintenance shall include work needed to protect the road from seasonal weather damage, to restore damage or wear caused by PURCHASER'S use, and to safeguard soil, water, and drainage structures, as follows:

(a) Maintenance of the existing cross section of dirt, gravelled, or shot rock road by blading or shaping surface and shoulders. Banks shall not be undercut, and established berms shall be maintained. Additional berms shall be placed where needed to protect fills.

(b) Removal of bank slough, minor slides and fallen timber, replacement of material eroded from fill slopes and by minor washouts, and cleaning out of ditches and culverts. The work shall be that which can practically be accomplished by a motor patrol grader equipped with a front end blade, or comparable equipment, and by the use of hand tools.

(c) Preventive maintenance at the end of PURCHASER'S hauling each season to minimize weather damage during the non-hauling period. This may include shaping and grading, cross-ditching, and removal of debris from any stream channel, when the debris was caused by PURCHASER'S activities and when the debris is endangering or will cause damage to roads, bridges, or culverts.

(d) Patching and additional rocking of gravel road surfaces as determined necessary by STATE to repair or restore damage and wear caused by PURCHASER'S operations.

(e) Removal of brush or tree growth or other obstructions to visibility as the obstructions develop during the contract period. Herbicides may be used only with written authorization of STATE.

While performing normal maintenance work, PURCHASER shall avoid leaving dirt or debris on gravel or bituminous road surfaces. PURCHASER shall avoid blading surface material off surface of roads, and shall minimize damage to road surfaces and ditches caused by logging operations, and shall restore the road to its original condition within a reasonable period of time.

Section 32. Secondary Road Maintenance. Secondary truck roads used or constructed by PURCHASER shall be kept free of obstructions and maintained in a condition to permit travel by standard-drive automobiles during any period of log hauling operations under this contract, and during closed fire season. PURCHASER shall leave these roads open and passable upon completion of operations under this contract, unless otherwise instructed by STATE.

FIRE PROTECTION

Section 33. Fire Protection. PURCHASER shall take all necessary precautions for the prevention of forest fires and shall be responsible for the suppression and bear the suppression costs of any and all fires occurring within or without the contract area resulting from any and all operations involved in the removal of the timber under the provisions of this contract.

The Alaska Forest Protection Act (AS 41.15.010 et seq.) established the fire season from May 1 - September 30. AS 41.15.080 requires every person owning or operating a sawmill or logging camp or other commercial plant or operation in forested lands to post and keep displayed at all times a copy of AS 41.15.050 — 080 and AS 41.15.140 in a conspicuous place upon the building or ground of the milling, logging or commercial operation.

PAYMENT BOND—INDEMNITY

Section 34. Payment Bond. PURCHASER shall furnish an acceptable bond in the form of surety bond, cash bond, negotiable securities or an individual surety bond acceptable to STATE to guarantee payments for timber from this timber sale contract between STATE and PURCHASER. The bond or securities shall be in the amount of \$250,000. When the payment bond has been furnished to STATE, the bid deposit will be refunded to PURCHASER.

Section 35. Indemnity. PURCHASER shall be responsible and liable for all accidents, damage or injury to any person or property resulting from any activities, duties and obligations of PURCHASER under this contract for which PURCHASER may be legally liable, and PURCHASER shall hold blameless and harmless, and shall indemnify, the State of Alaska and its officers, employees and agents against any and all claims, demands, loss, injury, damage, actions and costs of actions whatsoever, which they or any of them may sustain by reasons of any act, omission or neglect of PURCHASER, or employees, agents, representatives or contractors of PURCHASER, in connection with the activities, duties and obligations of PURCHASER under this contract.

ADMINISTRATION OF CONTRACT

Section 36. Extension of Time. An extension of time of this contract, not to exceed one year at a time, will be approved by STATE only upon written request from PURCHASER and with the written consent of the surety of PURCHASER; an extension will be granted only upon a showing by PURCHASER that the failure to perform this contract within the specified period was due to causes beyond the control of PURCHASER and without fault or negligence of PURCHASER. The written request must be received not later than 30 days or earlier than 90 days before the expiration date of this contract. The request shall state the date to which the extension is desired and must describe the conditions which have prevented PURCHASER from completing this contract within the specified time.

Section 37. Alterations in Details. STATE reserves the right to make, at any time during the progress of the work to be done, the minor changes or alterations in cutting boundaries, drainage structures, etc. as STATE may determine to be necessary or desirable. However, the changes or alterations shall not change the character of the work to be done, nor increase the cost thereof unless the cost increase is approved in writing by PURCHASER. Any changes or alterations so made shall not invalidate this contract nor release the surety of PURCHASER on the performance bond, and, PURCHASER agrees to do the work as changed or altered as if it had been part of the original contract.

Section 38. Reservations for Scenic Purposes, Fish and Wildlife Habitat Protection. STATE may reserve from designated cutting units timber that (a) has or may subsequently develop special scenic values in connection with water courses and recreational sites, or (b) cannot be logged without disturbing wildlife and fisheries habitat under AS 16.05.840, AS 16.05.870 and AS 41.17.010, et seq. Insofar as practical, the STATE shall identify these reservations before the purchaser submits his annual Operating Plan. Reservations under this section will be confined to the smallest reasonable area necessary and will not reserve more than five million board feet of spruce and hemlock from the cutting units as designated on Exhibit "A."

Section 39. Violations, Suspension and Cancellation.

(1) If PURCHASER violates any of the terms or conditions of this contract, including the approved Operating Plan, STATE shall notify PURCHASER in writing of the violation, and allow a reasonable period of time to comply with the contract. If satisfactory compliance is not made within the time allowed, STATE may suspend by written notice further operations under the contract, except those operations as may be necessary to remedy the violation. The suspension will continue in effect until PURCHASER complies with the contract in a manner satisfactory to STATE.

(2) STATE may immediately suspend by written notice further operations that, in the judgment of STATE, constitute a threat of immediate and unacceptable resource damage or an immediate threat to human life.

(3) If PURCHASER fails to remedy violations of this contract within 30 days after receipt of the notice of violation given under this section, STATE may, by written notice, cancel this contract and take appropriate action to recover all damages suffered by STATE by reason of the violations, including application of the payment bond and/or performance bond toward payment of the damages.

Section 40. Subletting of Contract. It is understood and agreed that, if all or any part of the logging operations or work to be done under this contract is subcontracted, the subcontracting done by PURCHASER will in no way relieve PURCHASER of any responsibility under this contract. PURCHASER will notify STATE of the names and addresses of all subcontractors. Subcontracting must be acceptable to STATE.

Section 41. Assignment of Contract. PURCHASER agrees not to assign, transfer, convey or otherwise dispose of this contract, or the right, title, or interest therein, either in whole or in part, or the power of PURCHASER to execute this contract, to any other person, firm, or corporation, without the previous written consent of STATE.

Section 42. Notices. Any written notice to PURCHASER which may be required under this contract to be served on PURCHASER by STATE, may be served by personal delivery to PURCHASER or the designated representative or representatives of PURCHASER, or by mailing the notice to the address of PURCHASER as given in the contract, or by leaving the notice at that address. If PURCHASER is required to notify STATE concerning the progress of the work to be done, or concerning any matter or complaint which PURCHASER may have to make regarding the contract subject matter, or for any other reason, that notification must be made

in writing, delivered to the designated representative of STATE in person, or mailed to the address of STATE as given in this contract.

Section 43. Authorized Representative. During any period of logging operations or activity on the timber sale area, and during any period of doing the work required by this contract on location, PURCHASER shall have a designated representative or representatives available to STATE on the timber sale area or work location, or both where the activity is separated; the representative or representatives shall be authorized to receive on behalf of PURCHASER any notice or instructions from STATE and to take whatever action may be required in regard to performance of PURCHASER under this contract. STATE shall designate an authorized field representative or representatives who shall be authorized to receive notices, inspect progress of work, and issue instructions in regard to performance under the terms of this contract.

Section 44. Inspections and Records. STATE, through its authorized and designated representative or representatives, shall at all reasonable times be allowed access to all parts of the logging operations and work locations of PURCHASER, and shall be furnished all information and assistance by PURCHASER, or the designated representative or representatives of PURCHASER, as STATE may require to make a complete and detailed inspection.

STATE through its authorized and designated representatives, shall have access at all reasonable times to the books and records of PURCHASER, his contractors, and subcontractors relating to operations under this contract including operating cost data and selling price data. Information so obtained shall be treated as confidential and used solely for the administration of this contract.

Section 45. Removal of Equipment and Materials. It is understood and agreed that PURCHASER, upon completion of the requirements of this contract, is to promptly remove from the timber sale area and work location, and other property owned or controlled by STATE, all equipment, materials

and other property PURCHASER has placed or caused to be placed thereon that is not to become the property of STATE. It is further understood and agreed that any such equipment, materials and other property that are not removed within 90 days after the day this contract terminates, or within any longer period of time as may be agreed upon in writing between PURCHASER and STATE, shall become the property of STATE and may be used or otherwise disposed of by STATE without obligation to PURCHASER or to any party to whom PURCHASER may transfer title. Nothing in this section shall be construed as relieving PURCHASER from an obligation to clean up, and to burn, remove, or dispose of debris, waste, and similar materials, in accord with other provisions of this contract.

Section 46. Causes Beyond Control. In the event PURCHASER is prevented by a cause or causes beyond control of PURCHASER from performing any obligation of this contract, nonperformance resulting from such cause or causes shall not be deemed to be a breach of this contract which will render PURCHASER liable in damages or give rise to the cancellation of the contract. However, if and when such cause or causes cease to prevent performance, PURCHASER shall exercise all reasonable diligence to resume and complete performance of the obligation with the least possible delay. The phrase "cause or causes beyond control," as used in this section, means any one or more of the following causes which are not attributable to the fault or negligence of PURCHASER and which adversely affect the operations of PURCHASER: fire or other casualties and accidents; strikes, riots and civil commotions; war and acts of public enemies; storms, floods and other unusual climatic conditions, including droughts or orders of duly constituted public authorities; and other similar circumstances beyond the control of PURCHASER.

Section 47. Laws, Regulations and Orders. PURCHASER at all times shall observe and comply with federal and state laws, and lawful regulations issued thereunder, and local by-laws, ordinances and regulations, which in any manner affect the activities of PURCHASER under this contract.

SPECIAL PROVISIONS

Section 48. Designated Timber. Pursuant to Section 4 of this contract, the timber sold within the sale area is as follows:

All timber within Units 5, 6, 7, 8, 9, 10, 11 and 12, and all right-of-way timber.

The boundaries of the sale area are marked as follows:

- (1) The unit boundaries are painted and flagged.
- (2) The right-of-way boundaries are flagged and blazed.

Section 49. Payment Schedule. (a) PURCHASER shall pay within 10 days of the first of each month for all timber cut and scaled the previous month.

(b) All payments and deposits shall be made payable to the Alaska Department of Revenue and shall be submitted to the Southcentral District, Division of Forest, Land and Water Management, Department of Natural Resources.

Section 50. Purchase Price. The purchase price for all timber removed from the timber sale area shall be paid for on the basis of net log scale, unless otherwise specified at the rates set forth below:

Species	Estimated Volume	Unit Price	Total Price	Bid Premium
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Section 51. Rate Redetermination. STATE shall redetermine the stumpage rates annually. Rates will be redetermined in February of 1981, and each February thereafter during the life of this contract using the amendments and interim updates of the United State Forest Service for the fourth quarter of the previous year.

To determine stumpage rates STATE will use procedures in effect in the Timber Appraisal Handbook of the United States Forest Service at the time of the redetermination. Bid Premium rates shall be added to all redetermined rates.

Section 52. Merchantable Logs. PURCHASER shall remove all products from the sale area which meet the merchantability standards stated herein:

Any conifer log which is 12 feet or more in length, and is 6 inches or more in scaling diameter and which will produce not less than 50 percent of the gross volume in firm, useable chips.

PURCHASER may remove logs from timber sold on the sale area which do not meet the standards listed below.

Section 53. Log Measurement.

(1) *Scaling Locations, Rules, Scaling Parties.* All logs from timber sold under the terms and conditions of this contract shall be scaled before they leave the log transfer site at Icy Bay. Determination of volume shall be made in accordance with the published Official Log Scaling and Grading Rules in use by the Puget Sound Log Scaling and Grading Bureau, with the following exceptions concerning spruce and hemlock:

(a) For scaling purposes, the minimum volume of #3 sawmill logs has been amended downward to 10 board feet net scale, which results in a combination of #3 and #4 sawmill grades.

(b) In scaling logs over 42 feet in length, each segment shall be scaled independently of each other using the actual scaling diameter of each segment, rather than the "one-in-ten rule."

Scaling shall be done by a log scaling and grading bureau, independent third-party agency, firm or corporation, approved by STATE. PURCHASER shall enter into a written agreement with the approved third-party scaler for the scaling of logs removed from the timber sale area. PURCHASER shall furnish STATE with a copy of the scaling agreement upon request.

(2) *Costs of Scaling.* All costs of scaling shall be paid by PURCHASER. All costs incurred by PURCHASER in connection with reports furnished STATE will be paid by PURCHASER.

(3) *Scaling Instructions.* PURCHASER shall require the scaling party to furnish to STATE, by the 10th of each month copies of all scale certificates and/or scale tickets showing gross

and net volumes by species of all logs scaled during the previous month. Upon request by STATE, PURCHASER shall also require the scaling party to furnish and attach a log detail listing to each monthly scale certificate showing all STATE logs included on the certificate.

PURCHASER agrees that STATE may provide written information and instruction to the scaling party for the scaling of logs in accordance with terms of this contract, including request for copies of scale certificates and log detail lists to be furnished directly to STATE. A copy of all such instructions shall be furnished by STATE to PURCHASER.

(4) Utilization. PURCHASER shall not deliberately buck timber to reduce the size of logs to less than the minimum merchantability standards of this contract, and shall take reasonable precautions to prevent loss due to breakage in felling and yarding of timber. PURCHASER shall buck logs in various lengths to secure the greatest practicable utilization of timber. For purposes of merchantability, minimum net log volume shall be determined by the net volume of the full log length rather than the volume of individual segments.

(5) Converting Factors. STATE may approve the use of appropriate converting factors, sample scaling techniques, and measurement by weight, when these methods are a more practical means to measure the timber and logs sold by this contract.

(6) STATE will provide for check scale of state timber at intervals to be determined by STATE, or its authorized representative, and in the event the check scales show a variance of \pm two percent net scale, STATE may request the scaling party to make a rescale. In the event the scaling party determines it necessary to demand compensation for the cost of making rescales, PURCHASER agrees to pay the scaling party the cost of the services. PURCHASER agrees to cooperate with STATE in providing conditions satisfactory to make check scales.

(7) PURCHASER will submit to STATE, in duplicate, a raft receipt for each raft before shipping logs from Icy Cape.

Section 54. Penalty Scale. STATE shall scale logs or portions of logs broken or wasted by PURCHASER due to: (1) improper felling or bucking of the logs, (2) failure to remove the logs before deterioration, (3) logs remaining on the sale area after completion of logging; provided such logs were merchantable before breakage or wastage. PURCHASER shall pay for these logs at the contract price designated in Section 51. STATE shall immediately notify PURCHASER of the volume of logs so scaled. Payment shall be considered due on that volume as if the logs were removed on the date of the notification.

If PURCHASER disagrees with the findings made by STATE under this section, PURCHASER may furnish scaling by a third-party who shall be an authorized scaler for a log scaling and grading bureau or other qualified person; the third-party must be acceptable to STATE. Costs and expenses of the third-party shall be paid for by PURCHASER and the findings of the third-party shall be final.

Section 55. Felling. PURCHASER shall comply with the following requirements for felling on the scale area.

(a) Fell all trees and snags within the limits of the right-of-way, and all trees within the unit boundaries.

(b) Use Humboldt undercuts in felling all merchantable trees.

(c) Stumps will be cut so as not to exceed a height of 18 inches as measured on the side adjacent to the highest ground, except when determined by STATE. High stumps shall be paid for by PURCHASER at the rate of \$5.00 per stump, which sum shall be regarded as fixed, agreed, and liquidated damages.

Section 56. Felling Exceptions. STATE may reserve trees which are needed to protect and preserve nests and habitat of large or rare birds, e.g., ospreys, eagles, hawks, owls and pileated woodpeckers. STATE shall designate, before timber felling, the trees which are reserved and must not be cut.

Section 57. Timber Removal Schedule. A minimum of 20 million board feet of timber shall be cut and paid for three years from the effective date of the contract.

Section 58. Log Branding. Every log removed from the timber sale area by PURCHASER shall be branded unless otherwise approved in writing by STATE. PURCHASER shall only use the brand or brands designated or approved by STATE. STATE may issue to PURCHASER one or more STATE branding hammers, which shall be used to brand all logs removed from the timber sale area; and PURCHASER shall reimburse STATE for any branding hammers lost or damaged by PURCHASER. PURCHASER shall not have branding hammers on the timber sale area other than those approved by STATE in accordance with this section.

Section 59. Tree Markings. PURCHASER shall not remove, alter, damage or destroy any tree markings, and shall immediately report to STATE any markings damaged or destroyed. PURCHASER shall not cut or remove logs from any tree which has a damaged or destroyed marking until the marking has been restored by STATE.

Section 60. Method of Yarding. PURCHASER shall use only cable systems for yarding the timber sale area. The cable system shall fully suspend logs when yarding across anadromous streams. Tractor yarding of logs on road and landing locations may be permitted upon written approval of STATE.

Section 61. Progressive Logging. PURCHASER shall complete the following logging requirements on each setting before moving to a new setting, unless otherwise approved in writing by STATE;

- (1) Remove all merchantable logs from the setting.

(2) Construct cross-drainage ditches or waterbars as directed by STATE and in accordance with Section 27 of this contract.

(3) Remove slash and debris resulting from PURCHASER'S activities from streams as an ongoing process during logging.

To facilitate inspection of settings, PURCHASER shall give STATE five days advance notice of the anticipated completion date of logging operations on each setting. STATE shall complete the inspection within 2 days after receiving notification.

Section 62. Landings. Before yarding, PURCHASER shall mark the locations of suitable landings on the ground, show their location in the Operating Plan, and obtain written approval from STATE of the locations, under Section 22 of this contract. If necessary, STATE may mark additional timber as needed to construct landings. This timber shall be paid for at the same rate as the purchase price for contract timber. PURCHASER shall not yard logs across any STATE primary road and shall deck logs only at approved landings.

Section 63. Road and Landing Construction. PURCHASER shall take all measures which STATE determines necessary to protect stream banks and stream courses during road and landing construction, and to prevent erosion and dislocation of exposed soil and fill material, including but not limited to the following:

(a) All roads must be built to the specifications described in Exhibit "B," unless otherwise approved by STATE.

(b) All roads must be constructed following P-Line locations and drawings as marked on the ground by STATE unless special written permission is granted by STATE to change these locations.

(c) Temporary roads, tractor swings roads, and landings must be constructed of gravel or shotrock over unbroken ground surface where practical. Cuts, overcasts and areas of

unstable materials shall be avoided. When PURCHASER finds it impractical to avoid unstable areas, PURCHASER shall request an on-the-ground joint examination with STATE for the purpose of determining an acceptable solution. After the joint site examination, STATE will issue a written decision with respect to the location of the road or landing.

(d) Unless otherwise approved in writing and staked on the ground by STATE, road fill placed by PURCHASER shall not cover, encroach on, or alter permanent or intermittent water channels.

(e) When rock overlay material is used over decking on native log bridges, side logs or wood chinking, a woven or polypropylene fabric blanket shall be installed prior to depositing rock overlay materials. Streams shall be cleared of debris which results from PURCHASER'S operations and which may affect the natural flow of the stream. Heavy equipment shall not be operated in streams except at designated crossings and when essential to construction of culverts and bridges.

Section 64. Road Maintenance.

(a) In removing material from sliders or other sources, PURCHASER shall deposit the material so that the material will not erode into streams, lakes, or reservoirs, as designated by STATE.

(b) All spur roads shall be put-to-bed within 6 months after use of the road has been terminated. PURCHASER will out-slope roads, install cross ditches, remove culverts and clean ditches as is needed to prevent serious soil washing and to keep the discontinued road from permanently affecting the natural pattern of surface drainage in its vicinity. Debris from log culverts shall be randomly dispersed over the road template and shall be laid on the ground in a near natural location.

(c) On cut and fill slopes, waste and spoil areas susceptible to erosion, or along roads constructed or used by the PURCHASER, PURCHASER shall revegetate by seeding with grass. STATE may require fertilization and mulching as part of the revegetation work.

(d) The primary road will be stabilized after use has been terminated. All bridge stringers shall be removed and laced on the east banks of each stream or river. All debris shall be removed from the cutslope and ditches. All ditches shall be cleaned. If a berm has developed on the road template, it shall be removed or, if STATE approves or directs openings in the berm shall be constructed as marked on the ground.

(e) The road surface shall be graded to a uniform flat surface with approximately 2 percent outslope, if it has been constructed with no ditch, and graded with a crown if constructed with a ditch to aid surface runoff. In both instances all wheel ruts will be eliminated.

Section 65. Permits. STATE shall secure the necessary permits from the U.S. Army Corps of Engineers for log transfer and storage areas. STATE shall also secure the necessary permits under AS 16.05.870 and AS 38.05.330.

Section 66. Fire Protection. During the fire season, PURCHASER shall provide and maintain sufficient fire-fighting tools in the sale operating area to equip each man engaged in the logging operation. In addition, PURCHASER may be required, during periods of high fire danger, to have the following equipment on the sale area:

(1) Water supply: a self-propelled tanker or portable trailer in operable condition of not less than 300 gallons;

(2) Water pump: size and capacity must be such that the pump will provide a discharge of not less than 20 gallons per minute when pumping through 50 feet of hose equipped with a one-quarter inch inside diameter nozzle at pump level;

(3) Hose and nozzle: at least 500 feet of serviceable hose of not less than three-quarter inch inside diameter, and a nozzle with an inside diameter of one-quarter inch;

(4) Water, supply, pump, and not less than 250 feet of the hose and the nozzle, as required by this section, must be maintained as a connected, operating unit ready for immediate use at any time;

(5) Internal combustion engines must be equipped with a spark arrester maintained in good condition that meets the standards set forth in the publication of the United States Department of Agriculture, Forest Service, entitled "Standard 5100-1a for Spark Arresters for Internal Combustion Engines," issued March, 1976, except that fully turbocharged internal combustion engines maintained in good condition are exempt from these requirements;

(6) Internal combustion engines must be equipped with one chemical fire extinguisher rated by Underwriters' Laboratories at not less than 4-B.C. The fire extinguisher must be placed on each engine so as to be visible to the operator and ready for instant use. The extinguisher must be equipped with a reliable and easily read pressure gauge; and

(7) All saws must be equipped with a spark-arresting device constructed to retain or destroy 90 percent or more of the carbon particles having a major diameter greater than 0.023 inches (0.584 mm). A spark-arresting device equipped with a woven screen with a maximum opening size of 0.023 inches (0.584 mm), constructed of heat- and corrosion-resistant wire at least 0.013 inches (0.330 mm) in diameter, will be considered in compliance with this requirement, if the total screen opening area is not less than 125 percent of the engine exhaust port area. The unit must be constructed to permit easy removal of the screen for field inspection, replacement, and cleaning.

During periods of high fire danger, PURCHASER may be required to provide a watchman, physically capable of and experienced in operating the firefighting equipment for the operation area. The watchman shall:

(A) be constantly on duty for three hours after the power-driven equipment used by the operator has been shut down for the day;

(B) visually observe all conditions of the operation area on which activity has been in progress; and

(C) have adequate facilities for transportation and communication in order to be able to summon assistance if needed.

During periods of high fire danger, PURCHASER may also be required to work a "hoot-owl" shift.

PURCHASER shall take action on any and all fires, in or near the timber sale area regardless of the origin of the fire. He shall continue suppression action until relieved by an authorized officer of the agency responsible for forest protection or by authorized State personnel.

All fires shall be reported immediately to STATE or to the agency responsible for protection in the area regardless of the size of apparent insignificance of the fire.

STATE may stop all or part of the logging operations of PURCHASER during especially hazardous fire weather.

PURCHASER shall comply with all laws, regulations, and rules promulgated and enforced by the agency responsible for fire protection in the area.

Section 67. Camp Facilities.

(a) PURCHASER shall submit a camp plan to STATE for approval before construction commences.

(b) PURCHASER shall secure all permits necessary from other agencies before construction commences.

(c) Fuel will be supplied by PURCHASER to STATE, at a price to be negotiated, for operation of state vehicles. Shop space will be made available by PURCHASER to STATE for maintenance of these vehicles if it does not interfere with PURCHASER'S operations.

(d) Upon request PURCHASER will furnish STATE with room and board for state personnel at no more than \$30.00 per day.

Section 68. Primary Manufacture. Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974.

For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips are considered to have received primary manufacture.

Section 69. Bond Reduction. Upon notice in writing to STATE by PURCHASER of the completion of all projects required under this contract, and 6 months after acceptance by STATE of all said projects, STATE will authorize a reduction in the amount of the performance bond to 10% of the value of the remaining timber and remaining project costs to the nearest \$100; provided STATE or other party affected by the reduction does not have a claim against PURCHASER.

Section 70. Project Work. PURCHASER shall complete the following projects in accordance with specifications provided in this contract and instructions from STATE. Project locations are shown on Exhibit A unless otherwise stated. PURCHASER shall furnish all material unless otherwise specified.

Project No. 1 Construct primary road between Point "A" and Point "B" according to the specifications in Exhibit "B."

Project No. 2 Construct primary road between Point "B" and Point "C" according to the specifications in Exhibit "B."

Project No. 3 Construct bridges as specified in Exhibits "B" and "D" and as marked on the ground.

Project No. 4 Furnish and install culverts as specified in Exhibits "B" and "C" and as marked on the ground.

Project No. 5 Spread the road rock according to the specifications in Exhibit "B."

Rock Source. The rock may be obtained from the STATE land at the location shown as "Quarry" on Exhibit A, or other locations acceptable to STATE.

Project No. 6 Construct secondary (spur) roads according to the specifications in Exhibit "B."

Section 71. Project Completion. PURCHASER shall complete all projects on a road section before log hauling on that section. However, STATE may waive this requirement if completion will cause damage due to logging operations, provided the section is completed as soon as the cause for the delay is removed. Right-of-Way logs may be removed from a road section before completion.

IN WITNESS WHEREOF, the parties hereto have subscribed their names and affixed their seals as of the date set forth in the first paragraph of this contract.

STATE OF ALASKA

PURCHASER

By _____

Title

By _____

Date

Title

Date

CERTIFICATE OF CORPORATE PURCHASER

I, _____, certify that I am the _____ Secretary of the Corporation named as Purchaser herein and that _____ who signed this contract was then _____ of that corporation; that said contract was duly signed for and in behalf of that corporation by authority of its governing body and is within the scope of its corporate powers.

_____ (Corporate Seal)

STATE OF ALASKA)
) ss.
 _____ JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this — day of _____, 19___, before the undersigned, a notary public in and for the State of Alaska, personally appeared _____, and acknowledged to me that he executed the foregoing instrument for and on behalf of _____, freely and voluntarily and for the use and purposes therein set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

 Notary Public in and for _____
 Commission Expires: _____

STATE OF ALASKA)
) ss.
 _____ JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this — day of _____, 19___, before the undersigned, a notary public in and for the State of Alaska, personally appeared _____, and acknowledged to me that he executed the foregoing instrument for and on behalf of _____, freely and voluntarily and for the use and purposes therein set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

 Notary Public in and for _____
 Commission Expires: _____

**LINDELL, LOG EXPORT RESTRICTIONS OF
THE WESTERN STATES AND BRITISH
COLUMBIA, PACIFIC NORTHWEST FOREST
AND RANGE EXPERIMENT STATION, U.S.
DEPARTMENT OF AGRICULTURE, FOREST
SERVICE (APPENDIX II TO MEMORANDUM OF
LAW BY DEFENDANTS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT, FILED
NOV. 19, 1980)**

1978

USDA Forest Service General Technical Report PNW 63

**LOG EXPORT
RESTRICTIONS OF THE
WESTERN STATES
AND
BRITISH COLUMBIA**

GARY R. LINDELL

APPENDIX II

**Pacific Northwest Forest And Range Experiment Station
U.S. Department of Agriculture
Forest Service
Portland Oregon**

The pros and cons of softwood log exports from the West Coast have been debated for over a decade. Initially, the export market was generally viewed with favor, particularly during the early 1960's as a needed outlet for salvaged timber. But as exports grew with time and accounted for a growing share of the timber harvest, concerns were expressed as to the propriety of allowing the unrestricted export of logs (figs. 1 and 2). In response to these concerns, Alaska, Oregon, California, and Idaho implemented measures on State-owned lands and Federal control regulations were initiated to limit the export of unprocessed timber from lands managed by the U.S. Department of Agriculture Forest Service or the Bureau of Land Management of the U.S. Department of Interior.

This paper presents the main features of log export restrictions imposed by the various State and Federal agencies as well as those of British Columbia as of mid-1977. Where appropriate, some historical background will be given to provide a

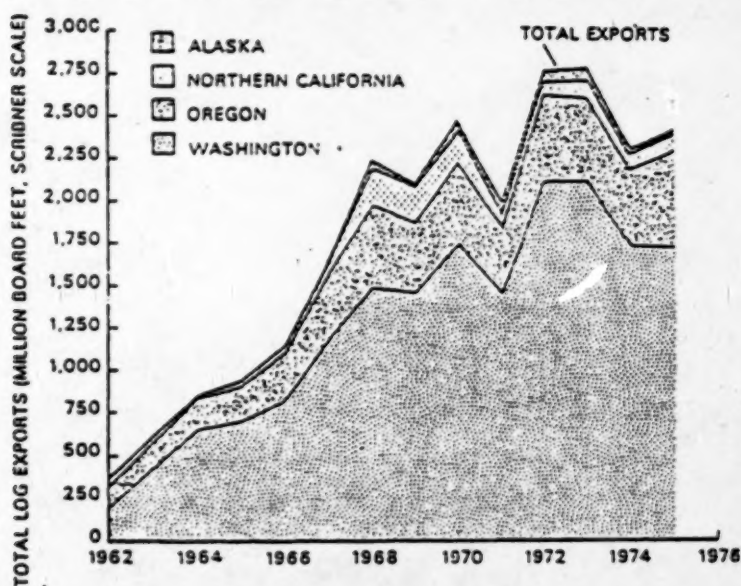


Figure 1.--Softwood log exports from ports in Washington, Oregon, northern California, and Alaska, 1962-75. Source: Ruderznan (1974).

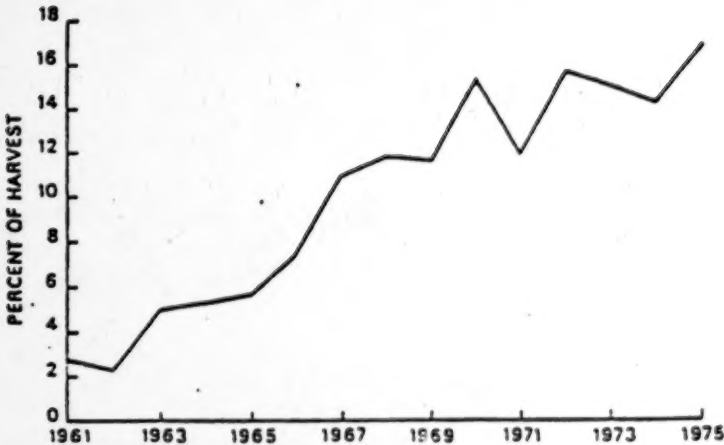


Figure 7.--Softwood log exports as a percent of timber harvest in Washington and Oregon 1961-75. Source: Ruderman (1976).

better perspective as to how present regulations evolved. For additional background, the reader is referred to Austin (1969).

JOINT DETERMINATION BY SECRETARIES OF AGRICULTURE AND INTERIOR

On April 16, 1968, the Secretaries of Agriculture and Interior issued joint determinations concerning log exports from National Forest and Bureau of Land Management lands in western Oregon and western Washington. These stated that a restriction on the volume of logs harvested and exported from Federal lands in unprocessed form was necessary to maintain a viable domestic wood processing industry capable of processing the sustained yield of timber from the selected areas. Authority for the action is contained in the Organic Administration Act of June 4, 1897 (16 U.S.C. 475, 551) in the case of the Secretary of Agriculture. The O and C Act of August 28, 1937 (50 Stat. 874), provided the enabling legislation for the Secretary of the Interior. The volume exported was to be limited to 350 million board feet annually to be divided between Forest Service and Bureau of Land Management lands in the

affected areas.¹ An accompanying plan provided operating and administrative details including the allocation of the limited or "exempt" volume among selected National Forests, the definition of processed products, and exceptions to be allowed such as Port-Orford-cedar which was declared surplus to domestic needs.²

This program was to be in effect until June 30, 1969, at which time it would be subject to review and possible renewal. It was superseded on January 1, 1969 by the Morse Amendment.

MORSE AMENDMENT

Following hearings in 1968, Senator Wayne Morse proposed Part IV of the Foreign Assistance Act of October 8, 1968, (82 Stat. 966) commonly called the Morse Amendment. Taking effect January 1, 1969, the Morse Amendment legislated the same log export quota that had been initiated by the joint determination by the Secretaries of Agriculture and Interior. The area under control, however, was extended to include all Federal lands west of the 100th meridian (a line running through central Texas) including Federal lands in Alaska. The 350 million board feet of exempted volume was jointly allocated to areas administered by the Forest Service or the Bureau of Land Management in Washington, Oregon, and California. The volumes subsequently exported, however, were below the allocated volumes (Austin 1973).

The Morse Amendment also authorized the Secretaries of Agriculture and Interior to issue rules and regulations to prevent the substitution of Federal timber for non-Federal timber

¹ A determination by the Secretary of Agriculture concerning primary processing of timber from National Forests of the Pacific Northwest (unpublished). Specified in the Secretary of Agriculture April 16, 1968 memorandum to the Chief of the Forest Service.

² Plan for requiring domestic primary manufacturing of logs from National Forest land in the Pacific Northwest (unpublished). Response to the April 16, 1968 memorandum of the Secretary of Agriculture.

which had been exported. In 1969 the Forest Service and Bureau of Land Management began exploring ways and means of implementing the substitution clause including the holding of a joint public advisory hearing at Portland, Oregon on September 26, 1969, to obtain comment on a proposed plan. No further action was taken, however.

The Morse Amendment further permitted the Secretaries of Agriculture and Interior to declare certain amounts of unprocessed timber as surplus to domestic needs and thus eligible for export. Such a determination could only be made after the holding of a public hearing to seek advice and counsel as to quantities, species, and grades that might be in surplus. Following public hearings at Portland, Oregon on December 6, 1968, Alaska-cedar was determined to be surplus to domestic needs from Forest Service and Bureau of Land Management lands in Washington, Oregon, and California.

Port-Orford-cedar was also found to be in surplus with the exception of small volumes of select salvage old-growth material which was deemed necessary for the manufacture of arrow shafts and thus ineligible for export. Other than this minor exception, Port-Orford-cedar may be exported in unprocessed form.

A similar hearing at Juneau, Alaska, on May 5, 1969, established that Alaska-cedar and western redcedar were surplus species from Federal lands in Alaska. Consequently these species were freely exportable from these Federal lands and the resulting volumes were in addition to the 350 million board feet of exempted volume.

The Morse Amendment had an expiration date of December 31, 1971. It was extended for an additional 2 years to December 31, 1973, by an amendment to the Housing and Urban Development Act of 1970 (84 Stat. 1817).

APPROPRIATIONS RIDER

In 1972, a combination of factors including an unprecedented housing boom both here and in Japan led to an extremely tight

supply situation for west coast softwood logs. Hearings were held in 1972 and 1973; and several proposals to limit log and/or lumber exports, including those from private lands, were introduced in Congress.

Finally, in October of 1973, Congress attached a rider to the Department of the Interior and Related Agencies Appropriation Act which in effect initiated a complete ban on the export of unprocessed timber from Federal lands in the West. The General Provision attached to the fiscal year 1974 appropriations bill stated:

No part of any appropriation under this Act shall be available to the Secretaries of the Interior and Agriculture for use for any sale hereafter made of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States which will be exported from the United States, or which will be used as a substitute for timber from private lands which is exported by the purchaser—*Provided*, that this limitation shall not apply to specific quantities of grade and species of timber which said Secretaries determine are surplus to domestic lumber and plywood manufacturing needs.³

Thus the provisions imposed by the appropriations rider were generally more restrictive than under the Morse Amendment. The appropriations rider constituted a complete export ban on Federal timber (except for those species and grades declared surplus) compared with a quota of 350 million board feet under the Morse Amendment. In addition, the language of the substitution clause was now directive whereas formerly the Secretaries were only authorized (but not directed) to enact regulations to prevent substitution. On the other hand, the appropriations rider was somewhat less restrictive in that Federal lands in Alaska were no longer included, whereas they were under terms of the Morse Amendment. As will be discussed later, however, log exports from National Forest lands in Alaska are restricted according to the terms of other legislation.

³ Department of the Interior and Related Agencies Appropriation Act, 1974 (P.L. 93-120, October 4, 1973), Sec. 301.

The appropriations rider has been attached to the Interior appropriations acts for each succeeding year (fiscal years 1974 through 1978) and is currently the basis for the complete ban on the export of unprocessed timber from lands administered by the Forest Service and Bureau of Land Management in the West (except Alaska).

The remainder of this section of the report will highlight recent Forest Service and Bureau of Land Management attempts to develop regulations to implement the terms of the rider to agency appropriations.

FOREST SERVICE

On October 26, 1973, the Forest Service published proposed regulations in the Federal Register and, based on comments received, Title 36 of the Code of Federal Regulations was revised to incorporate regulations prohibiting the export of unprocessed National Forest timber or its substitution for exported private timber. The effective date was March 13, 1974. These are the regulations currently in force; the more important provisions are as follows:⁴

1. *Unprocessed timber* does not include pulp (utility) grade logs and Douglas-fir special cull logs. In addition, the following are defined as having been processed and thus eligible for export.
 - a. lumber and construction timber sawn on four sides,
 - b. chips, pulp and pulp products,
 - c. green veneer and plywood,
 - d. poles and piling cut or treated for use as such,
 - e. cants cut for remanufacture, 8-3/4 inches in thickness or less.
2. *Substitution of public timber for private timber* which is exported occurs "when with respect to historic levels, (1) the purchaser continues to export and increases his purchase of National Forest timber, or (2)

⁴ Code of Federal Regulations, Title 36, Chapter II, Part 223.10.

the purchase of National Forest timber continues while the purchaser increases his export of unprocessed timber from private lands tributary to the plant for which National Forest timber covered by a specific contract is expected to be delivered."⁶ "Private lands" does not include lands managed by other Federal or State agencies or lands held in trust by the United States for Indians. The term "historic level" means 110 percent of the average annual volume of Federal timber purchased or exported during the calendar years 1971, 1972, and 1973. Thus, an individual is substituting National Forest timber for exported private timber if for a calendar year, and with reference to his historic level, he increases his export of private timber while continuing to purchase National Forest timber in a particular timbershed or he continues to export and increases his purchase of National Forest timber. Also, an increase in export of private timber is prohibited by contractual terms during any calendar year in which National Forest timber is harvested, if the National Forest timber was purchased pursuant to the above limitation.

3. *Surplus species* of timber are not bound by the regulations and are freely exportable. At present Port-Orford-cedar and Alaska-cedar are classified as surplus; following public hearings, the Secretary of Agriculture may declare additional species, grades, or quantities of timber as surplus to domestic needs. In addition, sales having an appraised value of less than \$2,000 are not bound by the export of substitution regulations.

The above regulations took effect in March of 1974 and have had only minor modifications since that time. In October 1975, the Forest Service responded to a request from a timber owner in the lower Columbia River area and solicited comments on the possibility of holding a public hearing to determine if specific quantities of western hemlock might be found surplus to domestic needs. The majority of the respondents opposed such a hearing and, as a result, no further consideration was given to adding western hemlock to the list of surplus species.

⁶ Code of Federal Regulations, Title 36, Chapter II, Part 223.10(e).

In April 1976, the Forest Service tried to standardize procedures for the holding of a public hearing to consider the question of surplus species. Two alternatives were offered.

One alternative required that proponents submit a thoroughly documented request supporting the conclusion that a particular species or grade is surplus. The Secretary would then file notice in the Federal Register asking for comments. Based on these, a decision would be made on the necessity for holding a public hearing.

The second alternative would involve an analysis of no-bid sales to determine which species or species groups were involved. Public hearings would be scheduled if the analysis indicated a surplus.

Public response favored the first alternative. Therefore, the Forest Service will use this procedure to determine if a class of material is surplus to domestic needs. No regulation change was required and none was made.

Also in April 1976, in response to a request by the House Committee on Appropriations, the Forest Service solicited comments on a proposed rule change governing the distinction between processed and unprocessed timber. Three alternative definitions were offered which bracketed the current definition of cants. One alternative would require that all material be completely sawn on four sides to qualify as processed. A second alternative would allow a limited amount of wane as permitted under "Export R" rules, of the Pacific Lumber Inspection Bureau (1971), and the third alternative would permit export of cants of any thickness. The first two alternatives would in effect eliminate the export of "waney" cants whereas the third is less restrictive than current practice.

The response favored continuance of the current definition; consequently, there are no plans for further efforts to revise the definitions of cants. A cant 8-3/4 inches in thickness or less meets current processing requirements.

BUREAU OF LAND MANAGEMENT

On June 6, 1975, the Federal Register contained notice that the Bureau of Land Management intended to amend the relevant parts of Title 43 of the Code of Federal Regulations to conform with the appropriations rider forbidding the export or substitution of Federal timber. Final regulations were published the following March 26, with an effective date of April 1, 1976. Subject to a minor amendment noted below, these regulations are currently in effect. The more important provisions are as follows.⁶

1. *Unprocessed timber* includes any logs except those of utility grade or below, split or round bolts not processed and suitable for end product use and cants or squares to be remanufactured exceeding 8-3/4 inches in thickness. The maximum size of an acceptable cant was simply a clarification of the earlier definition which described them as a "nominal" 8 inches which meant they could range up to 8-3/4 inches in size. The current definition of unprocessed timber is thus the same as that adopted by the Forest Service.
2. *Substitution* was defined as "the purchase of a greater volume of Federal timber by an individual purchaser than has been his historic pattern within twelve (12) months of the sale of export by the same purchaser of a greater volume of his private timber than has been his historic pattern during the preceding twelve (12) months, exclusive of Federal timber purchased by negotiated sale for right-of-way purposes."⁷

This means that a purchaser is substituting Federal timber for private exported timber if, with respect to his historical pattern, he increases *both* his purchase of Federal timber and export of private timber. His historical pattern is established from the date of his last export sale and includes the volume of Federal

⁶ Code of Federal Regulations, Title 43, Chapter II, Parts 5400, 5420, and 5450.

⁷ Code of the Federal Regulations, Title 43, Chapter II, Part 5400.0-5(n).

timber purchased and the volume of private timber exported for the 12-month period prior to this date. Substitution is determined by monitoring his purchase and export activities for the 12-month period following the above date. For example, assume that a purchaser's last export sale was June 1, 1977. His purchase and export activity for the period June 1, 1976 to June 1, 1977, thus establishes his historical pattern. Assume further that his purchase of Federal timber this period was 100 million board feet and his export sales totaled 40 million board feet. Substitution could then be illustrated by the activity over the succeeding 12-month period (June 1, 1977 to June 1, 1978).

	Federal timber purchases	Private timber exports	Substitution
	—Million board feet—		
Historical pattern (6/1/76 - 6/1/77)	100	40	—
Purchaser activity at various levels	100	40	No
(6/1/77 - 6/1/78)	110	40	No
	100	50	No
	110	50	Yes

During subsequent implementation of the substitution regulations, the Bureau of Land Management decided that further clarification of the area under consideration for administering the substitution clause was required. Since about 95 percent of Bureau of Land Management timber harvest originates in western Oregon, it was thought that this adequately defined the market area. The Agency subsequently decided that the area under consideration should be more closely tied to utilization facilities; and in August 1976, the definition of substitution was amended accordingly. The current Bureau of Land Management definition of substitution is thus:

- (1) The purchase of a greater volume of Federal timber by an individual purchaser than has been his historical pattern within twelve (12) months of the sale of export by

the same purchaser of a greater volume of his private timber than has been his historic pattern during the preceding twelve (12) months, exclusive of Federal timber purchased by negotiated sale for right-of-way purposes, and (2) the increase of both the purchase of Federal timber and export of timber from private lands tributary to the plant for which Bureau of Land Management timber covered by a specific contract is expected to be delivered.⁸

The first part of the definition pertains to an individual's purchase and export activity relative to his historical pattern; the second part establishes the market area. "Federal timber" means timber sold by the Bureau of Land Management. Timber sold for right-of-way purposes is subject to the export ban but not the substitution restrictions. The Bureau of Land Management definition of marketing areas is thus identical to that used by the Forest Service. The Forest Service definition of substitution is more restrictive, however, in that a continuation in purchases or export with an increase in either constitutes substitution whereas the Bureau of Land Management definition specifies an increase in both purchases and exports.

3. *Surplus species* may be designated by the Secretary of the Interior as available for export following public hearings authorized by the Director of the Bureau of Land Management to seek advice and counsel as to the specific grades and species that might be surplus to domestic needs. Port-Orford-cedar and Alaska-cedar have been so designated.

NATIONAL FORESTS IN ALASKA

Federal lands in Alaska are not included under the provisions of the appropriations rider pertaining to log exports; the provisions apply only to the contiguous 48 States. Since 1928, however, the Forest Service has limited the export of unprocessed logs from National Forests in Alaska under general authority granted by the Organic Administration Act of June 4, 1897 (16 U.S.C. 475, 551).

⁸ Code of Federal Regulations, Title 43, Chapter II, Part 5400.0-5(n).

Forest Service policy on limiting the export of logs was established by way of Secretary's approval of a memorandum from W. B. Greeley, Chief Forester, dated January 6, 1928. Subsequent regulations stated that no timber harvested from National Forests in Alaska may be exported in unprocessed form from Alaska without the prior consent of the Regional Forester. The primary processing requirement was imposed to insure the development and continued existence of adequate wood processing capacity essential for the utilization of timber from the State's National Forests. This constraint is more restrictive than those commonly in effect elsewhere, in that it not only forbids export of unprocessed timber from Alaska to overseas markets but also to domestic markets in other States.

Although timber from National Forests in Alaska may be exported with the consent of the Regional Forester, the regulations impose other restrictive factors that he must consider in making such a decision. Among other things, he must consider whether such export will:

- (1) permit a more complete utilization of material on areas being logged primarily for products for local manufacture, (2) prevent loss or serious deterioration of logs unsalable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, or fire, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet national emergencies or to meet urgent and unusual needs of the Nation.⁹

Species surplus to domestic needs and otherwise meeting any of these requirements are eligible for export following approval by the Regional Forester on a case-by-case basis.

Federal lands in Alaska did not share in the exempted volume granted under the provisions of the Morse Amendment. Following a public hearing on May 5, 1969, in Juneau, western redcedar and Alaska-cedar were, however, declared surplus to domestic needs and thus eligible for export; annual

⁹ Code of Federal Regulations, Title 36, Part 223.10(i).

exports from National Forest lands have averaged about 9 million board feet since then. In 1975, 13.5 million board feet of logs were exported and of this 58 percent was Alaska-cedar, the remainder western redcedar.¹⁰

By mid-1976 there were indications that surpluses of western redcedar were decreasing. Before considering export application, the Forest Service began to require proof that logs had been first offered for sale to domestic manufacturers. Following a public hearing, the Forest Service on November 18, 1976, established that western redcedar was no longer in surplus and thus would be exportable only if the processing requirements were met. This decision was appealed and subsequently reversed on September 26, 1977, for the area included in the long-term sale to the Ketchikan Pulp Company. Other than this exception, western redcedar may not be exported in unprocessed form from National Forest lands in Alaska. Alaska-cedar remains in surplus and thus exportable with permit.

The definition of primary manufacture for timber from National Forest sales in Alaska is the same as that employed on National Forest lands elsewhere. Cants not thicker than 8-3/4 inches meet the definition of primary manufacture. Green veneer and poles and piling are considered manufactured and thus eligible for export. Primary manufacture in the case of pulp manufacture means the breakdown process to that point where the wood fibers have been separated.

As a result of regulations published on December 5, 1977, chips are also considered as receiving primary manufacture. Formerly, chips could be exported only if manufactured from logging and milling waste, but not from roundwood. The objective of the revised regulation was to provide firms in Alaska with *marketing alternatives* for logs which are not suitable for sawing.

¹⁰ Information provided by Office of Regional Forester.

BUREAU OF LAND MANAGEMENT LANDS IN ALASKA

The Bureau of Land Management does not have an ongoing timber sale program in Alaska pending settlement of the Alaska Native Claims Settlement Act of 1971 (P.L. 92-203). The few small sales that are made are only for local, domestic needs. Consequently, no regulations have been written pertaining to the export of logs from Bureau of Land Management lands.

BUREAU OF INDIAN AFFAIRS

The Department of the Interior ban on log exports does not apply to lands managed on behalf of the Indians. Individual reservations may, however, impose such restrictions should they wish. As far as is known, none exists at this time.

There is one area of land managed on behalf of the Indians from which unprocessed timber may not be exported. This is an area of 61,360 acres known as the "McQuinn Strip," which borders on the north and west sides of the Warm Springs Reservation of Oregon. Ownership of the strip was disputed for many years because of an earlier contested survey. Finally, in 1972, title to the former Federal land which formed parts of two National Forests was ceded to the Confederated Tribes of the Warm Springs Reservation of Oregon.

The act¹¹ which transferred title to the land contained language which in essence was designed to retain existing marketing patterns for timber from the Strip until January 1, 1992. Among other things, the act specified that timber from the Strip must be designated for primary manufacture in the United States. In administering the act, the Bureau of Indian Affairs has adopted the Forest Service definition of processed versus unprocessed timber to define primary manufactured items, i.e., lumber, chips or pulp, green veneer, poles and piling, or cants 8¾ inches in thickness or less.

¹¹ Act of September 21, 1972 (P.L. 92-427, S. 2969).

STATE OF ALASKA

Since 1960, the State of Alaska has had primary manufacturing requirements on timber flowing from State-managed lands and destined for export from the State. Subject to approval of the Commissioner of Natural Resources, limited amounts of round logs (except spruce and hemlock) may be exported for experimental purposes such as to pilot test a new product. Other than this minor exception, unprocessed logs may not be exported.

Cants are considered to have received primary manufacture when sawed to a maximum thickness of 12 inches. Timber cut thicker than 12 inches must be squared on four sides with a wane allowance of up to one-third of each dimension (thickness and width). Thus, squares of any thickness are considered to have received primary manufacture.

The most recent Policy Statement on Primary Manufacture, issued in May 1974, was intended to ease restrictions pertaining to the export of chips.¹² Prior to that time chips were considered to have received primary manufacture and thus were eligible for export only when processed from logging or mill residues having no local market. The policy initiated in 1974 permitted the export of chips produced from surplus roundwood from interior Alaska.¹³ As before, chips from southeast Alaska may be exported only when produced from logging or mill residues.

Primary processing definitions for other products are similar to those for National Forest lands. In the case of pulp manufacture, primary processing is the point at which the fibers have been separated (other than the special case for chips discussed above). Green veneer and poles and piling meet primary processing requirements and are permissible for export.

¹² State of Alaska. Policy Statement on Primary Manufacture, May 7, 1974. Timber Sale Regulations, Section 76-130.

¹³ Areas west of 141° longitude.

STATE OF WASHINGTON

The State of Washington imposes no restrictions on export of timber from lands managed by the State. The most recent referendum was in 1968 when State voters defeated Initiative Measure No. 32 which would have required that all timber from State-managed lands receive primary manufacture within the State. In 1974, about 22 percent of the logs shipped by log export operations within the State originated from State-managed lands (Bergvall et al. 1975).

STATE OF OREGON

By an emergency act passed in 1963, the State of Oregon determined that all timber sold by the State or any of its political subdivisions must receive primary processing in the United States unless the State Department of Forestry has granted an export permit.¹⁴ Primary processing was defined by the act as "that stage of manufacture next beyond the log form of said timber."¹⁵ Port-Orford-cedar was exempted from the regulation.

The State Forester is empowered to issue an export permit if, after public hearings, the applicant has demonstrated that the timber is currently in log form and that there is no economic domestic market for the timber. The applicant must in good faith solicit offers from domestic processors within economic transportation distance, and show that such offers do not provide a profit above the minimum stumpage prices for the sale allowing for the costs of logging and transporting the logs to their current site. The State Forester was previously required to obtain the advice of an Advisory Committee on Foreign Processing, but this committee was abolished by the 1977 Oregon Legislature.

¹⁴ State of Oregon. Sale and processing State-owned timber. Chapter 298, Oregon Laws 1963.

¹⁵ Ibid., ORS 526.805.

Apparently the effect, if not the intent, of the regulations has been essentially a total ban on the export of logs from State-managed lands. Since the regulations went into effect in 1963, only 10 applications for export permits were received by the Forestry Department and of these only three were granted.¹⁶ Total volume for the three permits that were granted was less than 2 million board feet.

STATE OF CALIFORNIA

Through regulations promulgated in 1974, the State of California directed that unprocessed timber from State-managed forests shall not be sold either directly or indirectly to a primary manufacturer located outside the United States.¹⁷ Timber was deemed to have received primary manufacture when it was sawn on four sides and did not exceed 4 inches by 12 inches.

In addition to forbidding the foreign export of unprocessed timber from State-managed forests, the regulations further specified that State timber could not be substituted for timber that was exported from private lands.¹⁸ "Substitution" in this case means the replacement of State timber for unprocessed timber which is exported from lands owned or under the control of the purchaser within California and located no more than 200 miles from the sale boundary from where the State timber was removed. Purchasers of State timber are required to execute an agreement with the State Forester to this effect as a condition of sale. Furthermore, the purchaser must notify the State Forester of all locations of State timber until such time as the timber has received primary processing. Should the timber be resold prior to primary processing, the same substitution regulations are to be imposed on the new purchaser.

¹⁶ Information provided by Office of State Forester.

¹⁷ State of California. Public resources code, Section 4650.1.

¹⁸ State of California. Administrative code, Sections 1510-1521.

STATES OF IDAHO AND MONTANA

Small volumes of softwood logs normally flow from the Montana Customs District into Canada each year. The Montana Customs District includes all ports in Montana and Idaho. Montana imposes no restrictions on the export of unprocessed timber; Idaho does.

State of Idaho restrictions on the export of unprocessed timber cut from State-managed lands were tied to the original timber sale authority granted to the State Board of Land Commissioners. When granted timber sale authority, the Board was required to prescribe that timber cut from lands managed by the State must be manufactured into lumber or timber products within the State.¹⁹ The authority further specified that the sale of State timber for the manufacture of wood pulp was excepted from this provision.

Subsequent rulings have affirmed the provision that State timber must receive primary manufacture before it may be exported from the State. Unpeeled cedar poles and rough, green lumber have been classified as manufactured and are eligible for export.²⁰ Cants may be of any size and may be exported out of State provided they are not destined for subsequent remanufacture within facilities of the *same* company. Cants may be exported and sold to *another* company for subsequent remanufacture.

BRITISH COLUMBIA

In British Columbia, the Provincial and Federal governments share control over log exports; the Provincial government has authority over its natural resources, whereas the Federal government has jurisdiction over international trade. In practice, the two cooperate to insure that essentially all timber cut within the Province is subject to the same export controls.

¹⁹ State of Idaho. Idaho code, Section 58-403.

²⁰ Information provided by Idaho Department of Lands.

Provincial control over log exports dates from March 12, 1906, with the passage of the Forest Act.²¹ Part X of the Act stipulates that all timber cut on lands subject to Provincial control shall be used in the Province or manufactured in the Province. Lands under Provincial control include all Crown lands at the time of the passage of the Act as well as all lands granted after March 12, 1906.

Federal authority to control exports is contained in the Export and Import Permits Act²² and is extended to all log exports from the Province, even those from private lands. The Federal government, however, has, in essence, delegated log export control authority to the Province in the case of Provincial lands while retaining control over all remaining lands. The remaining lands include Federal lands, such as Indian reserves, and lands Crown-granted before 1906 which include the bulk of the private lands. Although the original intention of the Provincial and Federal controls varied, recent (1974) amendments to the Export and Import Permits Act have brought Federal objectives into conformance with those of the Province. The expressed objective of export control by both levels of government is now the promotion of natural resource manufacturing in Canada (Royal Commission on Forest Resources 1976).

Controls are implemented by prohibiting export of any unprocessed timber except that authorized under individual permits issued by the Provincial Lieutenant Governor in Council, and by the Federal Minister of Industry, Trade, and Commerce. Unprocessed timber includes that not meeting wane limitations as permitted on No. 3 common (utility) lumber under the Export "R" list (Pacific Lumber Inspection Bureau 1971). Chips also must receive permit for export.

²¹ Now called the Department of Forests Act, S.B.C. 1960, c 153, as amended.

²² Export and Imports Permit Act, R.S.C. 1970, C. E-17, as amended.

The Provincial Lieutenant Governor in Council and the Federal Minister of Industry, Trade, and Commerce are advised on log export applications by the Log Export Advisory Committee which consists of members of various industry groups and the relevant government official who serves as chairman. The Committee actually serves a dual purpose: To advise on permit applications subject to Provincial control and to advise on permits subject to Federal purview.

To render an affirmative decision, the Log Export Advisory Committee must establish the fact that the logs in question are surplus to the needs of domestic mills. To establish this fact, the applicant must advertise his logs according to specified procedures, following which he submits a formal application. Although the Log Export Advisory Committee has only an advisory role, its recommendations are generally adopted by the Provincial Cabinet and/or the Federal Minister of Industry, Trade, and Commerce.

The Chip Export Advisory Committee functions in a parallel fashion to the Log Export Advisory Committee and advises on export applications for wood residues. The committee is chaired by a member of the Council of Forest Industries, an industry association, and is composed of industry, producer, and consumer groups with governmental officials acting as observers. As with the case of log export applications, the committee must determine if an application for chip export represents supplies surplus to domestic needs. The recommendations of the Chip Export Advisory Committee are generally accepted by the Provincial Minister and Federal approval is routinely granted on top of Provincial approval.

In 1975, log exports totaled 150 thousand cunits or less than 1 percent of total harvest within the Province (Government of British Columbia, Forest Service 1976). Of this, 51 percent was exported under permit granted by the Provincial and Federal governments; the remainder was exported under permit granted solely by the Federal government.

TIMBER TAX

Exporters of timber or chips who have been granted permits subject to Provincial controls are also subject to a "timber tax" levied on the products. The level of the tax is established by the Lieutenant-Governor with the advice of the Executive Council and the Minister of Forests. By an order dated March 3, 1977, the levy on chips of \$1.50 per bone dry unit was deleted. Structured tax rates employed for logs have, however, been essentially the same since May 1974. They include \$2 per cunit for low-grade pulpwood, \$5 per cunit for cottonwood, \$40 per cunit for cypress, and \$10 per cunit for all other species (Royal Commission on Forest Resources 1976).

DISCUSSION

This survey indicates that fairly rigorous controls are exercised on log exports from public lands in the west coast area. As a result of combined Federal and State regulations in Alaska and the almost complete absence of private ownership of forest land, virtually all timber harvested in that State is subject to export regulations. A similar situation exists in the Province of British Columbia where all export of timber is subject to the approval of the Dominion Government.

In the remaining coastal States the proportion of total harvest affected by State or Federal export regulations varies somewhat. In the State of Washington only timber from National Forest and Bureau of Land Management lands is prohibited from export (no controls are imposed on State-managed lands). Together these accounted for less than 20 percent of the total harvest in 1975 (table 1). In California, the proportion of total harvest prohibited from export was about 37 percent while in Oregon, National Forest, Bureau of Land Management, some Indian lands, and State-managed lands were included which together supplied nearly half of the State harvest. For the combined three-State area, slightly over one-third of the 1975 timber harvest was directly prohibited from export by either Federal or State controls. An even larger, but

unknown, proportion of the harvest is affected when the possible impacts of the substitution regulations on private initiatives are considered. A private individual or company might be reluctant to export its timber if it jeopardized its potential supply of public timber.

No attempt will be made here to analyze the domestic effects of these constraints. Some analysis of the effect of softwood log exports on domestic employment has been made by Darr (1975), and Haynes (1976) has examined the price impacts of log export restrictions on domestic lumber and stumpage markets.

Further analysis will be required to assess the probable impact of these controls on the quantity of timber actually entering the export trade. The language of a restriction can be quite strict; but when related to the affected areas, it might have little impact on the quantity of timber available for export or the quantity actually exported. This would depend on additional aspects of supply such as total volumes affected, location, species, and grades as well as on the overriding importance of the characteristics of both domestic and foreign demand.

Table 1—Proportion of total timber harvest prohibited from export by direct Federal or State controls for Washington, Oregon, and California 1975

State	Total timber harvest by State	Portion of total harvest prohibited from export by Federal controls		Portion of total harvest prohibited from export by State controls		Portion of total harvest prohibited from export by Federal or State controls	
		million board feet	percent	million board feet	percent	million board feet	percent
Washington	6,185	1,099	17.8	—	—	1,099	17.8
Oregon	7,371	3,305	44.8	160	2.2	3,465	47.0
California	4,334	1,569	36.2	35	0.8	1,604	37.0
Total	17,890	5,973	33.4	195	1.1	6,168	34.5

Source: Ruderman (1976)
California Division of Forestry (1976)
Lloyd (1976, 1977)

Table 2 provides a comparison of some of the more important provisions of the log export and substitution restrictions for Federal, State, and Provincial jurisdictions.

Table 2—Comparison of log export restrictions

Geographic area	Lands affected	General limitations	Exemptions	Definition of primary processing	Definition of Substitution
All areas west of 100th meridian in contiguous 48 States.	National Forests	No export of unprocessed National Forest timber nor substitution for timber exported from private lands.	Port-Orford-cedar, Alaska cedar. Sales having appraised value less than \$2,000.	Cants 8-3/4 inches in thickness or less, lumber and squares, chips & pulp, green veneer and plywood, poles and piling.	With respect to historical levels, the purchaser continues to export and increases purchase of National Forest timber, or increases export of private timber while continuing purchase or harvest of National Forest timber.
All areas west of 100th meridian in contiguous 48 States.	Bureau of Land Management	No export of unprocessed BLM timber nor substitution for exported private timber.	Negotiated right-of-way timber sales. Port-Orford-cedar. Alaska-cedar.	Cants and squares 8-3/4 inches in thickness or less, lumber, chips and pulp, green veneer and plywood, poles and piling.	With respect to historical pattern both purchase of BLM timber and export of private timber increase.
Alaska	National Forests	No export of unprocessed timber from State.	Alaska-cedar. Western redcedar on long-term sale to Ketchikan Pulp Company.	Cants 8-3/4 inches in thickness or less, green veneer, poles and piling, pulp, and chips.	NA
Alaska	State of Alaska	No export of unprocessed timber from State.	With prior approval, small volumes of all species except spruce and hemlock may be exported for experimental purposes.	Cants 12 inches or less in thickness; squares any thickness with one-third each dimension (thickness and width) allowed in waste; chips from logging and mill waste; chips from roundwood in interior Alaska.	NA
Oregon	State of Oregon	Export of unprocessed timber by permit only based on unavailability of domestic markets.	Port-Orford-cedar	That stage of manufacture next beyond the log form.	NA

Table 2—Comparison of log export restrictions—continued

Geographic area	Lands affected	General limitations	Exemptions	Definition of primary processing	Definition of Substitution
Oregon	McQuinn Strip portion of Warm Springs Reservation	Until January 1, 1992, timber from the McQuinn Strip must be designated for primary manufacture in the U.S.	None	Lumber, chips or pulp, green veneer, poles and piling cants 8-3/4 inches in thickness or less.	NA
California	State of California	No export of unprocessed timber nor substitution of State timber for timber exported from private lands.	None	Squares not exceeding 4 inches x 12 inches	Replacement of State timber for timber exported from private land within 200 miles of State timber sale area.
Idaho	State of Idaho	State timber must receive primary manufacture within State.	Pulpwood	Cants provided not subsequently remanufactured out-of-State by same firm; lumber, poles.	NA
British Columbia	All lands	Export of unprocessed timber or chips from Province only by permit based on surplus. Export tax on Provincial logs.	None	Lumber meeting waste requirements for No. 3 Common (Utility) under Export "R" list.	NA

NA — not applicable.

SUPPLEMENTAL AFFIDAVIT OF H. SUGIYAMA
(FILED DEC. 3, 1980)

Attorneys for Plaintiff
SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.

Civil Action No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and

THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,

Defendants.

DEC 3 1980

Burr, Pease & Kurtz, Inc._____

STATE OF ALASKA)
) ss.
JUDICIAL DISTRICT)

H. SUGIYAMA, upon being first duly sworn, deposes and states as follows:

1. That I am Vice President of SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., and am familiar with Alaska timber harvesting, utilization and export conditions.

2. That I have reviewed the report of *Production, Prices, Employment, and Trade In Northwest Forest Industries, First Quarter 1980*, Florence K. Ruderman, which is published by the United States Department of Agriculture, Forest Service, Pacific Northwest Forest and Range Experiment Station. This report shows that during years 1969 through 1979 the volume of softwood lumber (principally hemlock and spruce) which was exported from Alaska to foreign countries (principally Japan) ranged between a low of 237,795,000 board feet to a high of 404,849,000 board feet. It shows, also, that the 1979 volume was 278,462,000 board feet. Attached hereto is page 38 of that report which details these figures. Also, attached is page 27 of the report which shows the dollar volumes of such exports.

3. When compared to the volume of timber exported to foreign countries, the volume of Alaska timber which is utilized within Alaska is extremely small.

4. Within the South-Central/Gulf of Alaska area there is very little local market for Alaska lumber products. Any substantial sawlog operation utilizing Alaska logs from this area will necessarily sell the bulk of its products to Japan and other foreign countries.

5. It is also my observation that within Alaska there is absolutely no market for domestic resawing of "cant" or "square" manufactured to State of Alaska specifications. In other words, a cant or square manufactured in Alaska would be virtually unsaleable within local Alaska sawmill markets. The reasons are:

A. Any sawmill would prefer round logs for its sawmill operations and the small volume of round logs required would be readily available locally.

B. Round logs are preferable because they can be stored in the water and moved in the water, whereas cants must be transported on land.

C. Once a log is placed on the sawmill carriage and the costs of getting it there have been incurred, it produces more lumber for the costs involved than does a cant.

D. Also the round log is much less subject to deterioration from weather and outside conditions.

6. South-Central had experience with attempting to make a sale of cants inside the State of Alaska. We had some cants at Jakalof Bay which were manufactured to State specifications, but which were not loaded aboard ships during that season. We attempted to market those cants to a sawmill in Anchorage, but found that just costs of transporting the cants from Jakalof Bay to Anchorage exceeded the highest possible sales price of the cants. Accordingly no sale was made.

7. Based on the above statements and my observations of the Alaska timber industry, it is my firm conclusion that a cant or a square manufactured to State of Alaska primary manufacture specifications is marketable only in foreign commerce and cannot be sold for use within Alaska. It is also my firm conclusion that no sawmill in Alaska will manufacture a cant or square for any domestic Alaska market.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated this ____ day of December, 1980.

/s/ H. Sugiyama
H. SUGIYAMA

SUBSCRIBED and SWORN to before this ____ day of _____, 1980.

Notary Public for Alaska
My commission expires: _____

**Table 14—Volume and average value of softwood log exports
from Alaska ports by destination, 1969-80**
(Volume in thousand board feet, Scribner scale; value in
dollars per thousand board feet)

YEAR AND QUARTER	VOLUME	AVERAGE VALUE
TO ALL COUNTRIES		
1969	31,889	118.95
1970	51,531	125.58
1971	42,600	116.54
1972	65,837	125.88
1973	71,719	248.23
1974	34,949	240.82
1975	29,011	307.97
1976	26,197	224.59
1977	52,377	263.54
1978	68,025	320.45
1979—		
1st quarter	15,830	385.25
2d quarter	27,656	515.86
3d quarter	34,144	433.10
4th quarter	50,967	498.60
1979 total and average value	128,597	470.97
1980—		
1st quarter	26,021	475.33
2d quarter		
3d quarter		
4th quarter		
1980 total and average value		

TO JAPAN		
1969	30,889	121.79
1970	47,583	129.67
1971	38,948	120.94
1972	61,882	129.99
1973	71,706	248.24
1974	29,088	252.71
1975	24,311	352.29
1976	20,741	253.18
1977	46,897	278.99
1978	57,653	343.49
1979—		
1st quarter	14,473	388.56
2d quarter	25,744	503.61
3d quarter	33,980	433.60
4th quarter	46,606	511.53
1979 total and average value	120,753	475.21
1980—		
1st quarter	25,223	472.33
2d quarter		
3d quarter		
4th quarter		
1980 total and average total		

Source—U.S. Department of Commerce. The valuation definition used in the export statistics is the value at the seaport or border port of exportation. It is based on the selling price (or cost if not sold) and includes inland freight, insurance, and other charges to the port of exportation. Data are compiled from Department of Commerce records at the end of each quarter.

**Table 25—Softwood lumber exports from Alaska ports, by
species and destination, 1969-80
(In thousand board feet)**

Year and Quarter	Total	Western Hemlock	Sitka Spruce	Cedar	Other Softwoods
TO ALL COUNTRIES					
1969	285,894	57,235	228,659	0	0
1970	315,586	90,974	219,011	708	4,893
1971	247,414	92,243	155,171	0	0
1972	340,196	155,407	184,649	0	140
1973	404,849	210,555	194,143	12	139
1974	362,432	205,144	154,525	2,641	122
1975	313,307	179,398	132,556	1,353	0
1976	290,011	134,387	148,526	1,298	5,800
1977	250,044	122,544	121,350	5,579	571
1978	237,795	126,218	111,435	53	89
1979—					
1st quarter	90,668	57,439	22,926	303	0
2d quarter	75,811	42,578	32,719	29	485
3d quarter	64,229	35,898	28,306	0	26
4th quarter	57,754	36,090	19,894	147	1,623
1979 total	278,462	172,005	103,844	479	2,134
1980—					
1st quarter	66,402	43,514	22,888	0	0
2nd quarter					
3d quarter					
4th quarter					
1980 total					

TO JAPAN

1969	285,432	57,235	228,197	0	0
1970	315,386	90,774	219,011	708	4,898
1971	245,974	91,357	154,617	0	0
1972	336,798	152,555	184,243	0	0
1973	403,988	210,536	193,390	12	0
1974	361,691	204,845	154,206	2,641	0
1975	312,976	179,122	132,501	1,353	0
1976	289,197	134,274	148,221	902	5,800
1977	245,445	122,471	121,083	1,391	500
1978	236,615	125,355	111,207	53	0
1979—					
1st quarter	80,653	57,439	22,926	288	0
2d quarter	72,673	40,722	31,961	0	0
3d quarter	62,614	35,898	26,716	0	0
4th quarter	57,675	36,090	19,815	147	1,623
1979 total	273,615	170,149	101,408	435	1,623
1980—					
1st quarter	63,403	41,507	21,896	0	0
2d quarter					
3d quarter					
4th quarter					
1980 total					

Source—U.S. Department of Commerce. Data are compiled from Department of Commerce records at the end of each quarter.

**MEMORANDUM AND ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF ALASKA (ENTERED JAN. 5, 1981)**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

No. A80-311 Civil

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of Natural Resources of the State of Alaska; GEOFFREY HAYNES, Director, Division of Natural Resources, and Deputy Commissioner of Department of Natural Resources of the State of Alaska; and THEODORE G. SMITH, Director of Division of Forest, Land and Water Management, of Department of Natural Resources of the State of Alaska,

Defendants,

KENAI LUMBER COMPANY,

Intervenor.

FILED

January 5, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

By _____ Deputy

MEMORANDUM AND ORDER

VON DER HEYDT, Chief Judge.

THIS CAUSE comes before the court on cross motions by plaintiff and defendant for summary judgment, and defendant-intervenor's motion to dismiss. The parties agree that the sole issue to be decided is whether the State's requirement of primary manufacture violates the Commerce Clause of the

United States Constitution.¹ As the matter in controversy exceeds the sum of \$10,000, this court has jurisdiction pursuant to 28 U.S.C. § 1331(a).

I. FACTS

In September, 1980, the State of Alaska gave notice that it would sell approximately 49,185,000 board feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of the sale provided, pursuant to 11 A.A.C. § 76.130,² that "primary

¹ U.S. Const., art. I § 8 provides in relevant part: "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several states . . ."

² 11 A.A.C. § 76.130 (1974) provides:

PRIMARY MANUFACTURE

- (a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.
- (b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means
 - (1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or
 - (2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).
- (c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

Authority: AS 38.05.080
 AS 38.05.110
 AS 38.05.115
 AS 38.05.120

manufacture within the State of Alaska will be required as a special provision of the contract." The inclusion of the primary manufacture requirement in the timber sales contract requires a successful bidder to pre-cut the sale timber in Alaska prior to export.

Plaintiff South-Central Timber Development, Inc. (South-Central) is an Alaskan corporation engaged in the business of purchasing Alaska standing timber, logging such timber, and shipping the resulting logs into foreign commerce. Although South-Central desires to bid on the Icy Cape No. 2 timber sale, it is hampered by its lack of a working mill in Alaska. South-Central must take into account the added costs of having primary manufacture performed in-state. This added cost effectively precludes South-Central from bidding on the timber.

II. THE COMMERCE CLAUSE AND PRIMARY MANUFACTURE

The State and intervenor contend that the primary manufacture requirement is permissible under the commerce clause for two reasons: 1) Alaska's policy of requiring primary manufacture as a term of a state timber contract is consistent with federal policy as expressed by Congress; and, 2) by including primary manufacture as a term in the state timber contract, the state is not regulating interstate commerce; rather it is acting in a proprietary capacity as a market participant and is therefore exempt from commerce clause requirements.

A. Federal Policy Of Primary Manufacture

It is clear that if Congress had consented to the State's primary manufacture requirement, any commerce clause restrictions would be waived. *E.g. Southern Pacific Co. v. Arizona*, 325 U.S. 781, 789 (1945). To determine whether Congress has consented to the requirement, the court must examine the relevant Congressional provisions in this area.

The State points out that the federal government historically has placed restrictions on the export of unprocessed logs from federal lands in the western states, including federal lands in Alaska. Since 1928, the United States Forest Service has restricted the export of unprocessed timber from national forest timber sales in Alaska under the general authority granted by Congress. 16 U.S.C. § 471 *et seq.* (1976) (National Forests).

Section 475 provides in part that one of the purposes for establishing a national forest is "to furnish a continuous supply of timber for use and necessities of the citizens of the United States" Section 551 allows the Secretary of Agriculture, under the provisions of § 471, to make necessary "rules and regulations and establish such service . . . to regulate . . . and to preserve the forests" Regulations currently in effect restrict the export, in unprocessed form, of timber harvested from sales in national forest land in Alaska. 36 C.F.R. § 223.10(i).³

³ 36 C.F.R. § 223.10(i)(1977) provides:

Subject to the other provisions of this section, timber cut from the National Forests in the State of Alaska may not be exported from Alaska in the form of logs, cordwood, bolts, or other similar products necessitating primary manufacture elsewhere without prior consent of the Regional Forester. This requirement is determined to be necessary in order to assure the development and continued existence of adequate wood processing capacity in that State essential to the sustained utilization of timber from the National Forests located therein which is geographically isolated from other processing capacity. In determining whether consent will be given to the export of such timber, consideration will be given, among other things, to whether such export will (1) permit a more complete utilization of material on areas being logged primarily for products for local manufacture, (2) prevent loss or serious deterioration of logs unsalable locally because of an unforeseen loss of market, (3) permit the salvage of timber, damaged by wind, insects, or fire, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

An examination of the relevant statutory provisions shows that Congress has not consented to any primary manufacture requirements imposed by the states. When Congress has exempted state laws from commerce clause restrictions, it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. *See* the Wilson Act, 27 U.S.C. § 121(1976); *see also* the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1976) ("silence . . . of Congress shall not be construed to impose any barrier to . . . regulation . . . by the several states.").

Although Congress has authorized the Secretary of Agriculture to make necessary rules to regulate the national forests, and has imposed export quotas on unprocessed timber from federal lands, it has in no way expressly exempted state timber laws from commerce clause restrictions. Given Congress' silence, a negative is presumed to bar state action inimical to the national commerce, and in such cases the Supreme Court is "the final arbiter of the competing demands of state and national interests." *South Pacific Co. v. Arizona*, 325 U.S. at 769.

B. The State As A Proprietor

The State maintains that it is acting in a proprietary capacity (as the timber subject to the primary manufacture requirement is state owned) and is therefore unrestricted by the commerce clause. *Reeves v. Stake*, 447 U.S. 429, 100 S. Ct. 2271 (1980); *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976). The Supreme Court has made clear, however, that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). The court must determine whether *Alexandria Scrap* and *Reeves* allow the State to require primary manufacture of state-owned timber within Alaska as a condition of sale.

1. Alexandria Scrap And Reeves

In *Alexandria Scrap*, the Court upheld a Maryland statute which promoted the disposal of abandoned automobiles through cash payments to scrap processors. Even though the payments favored in-state processors, the Court found no commerce clause problems. Relying on the fact that Maryland was acting in a proprietary capacity, the Court held that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others," 426 U.S. at 810.

In *Reeves*, the Court ruled that the commerce clause did not prohibit South Dakota from refusing to sell cement from a state owned and operated cement plant to out-of-state customers, pursuant to its policy of supplying South Dakota customers first. The Court noted that "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." 477 U.S. at 436, 100 S. Ct. at 2277.

The *Reeves* Court termed the holding in *Alexandria Scrap* the "general rule" as to states acting in a proprietary manner. 477 U.S. at 440, 100 S. Ct. at 2279. The Court went on to concede the possibility of an exception, but reasoned: "in this case [there is] no sufficient reason to depart from the general rule." *Id.* Later, the Court addressed the possible limits to the *Alexandria Scrap* exemption when it considered the argument that if a state were allowed to hoard its resources "Pennsylvania might keep its coal, the northwest its timber, [and] the mining States their minerals." *West v. Kansas Nat. Gas Co.*, 221 U.S. 229, 255 (1911). The Court distinguished cement from natural resources such as coal, timber, wild game, and minerals, and noted that "South Dakota has not sought to limit access to the State's limestone or other materials used to make cement." 447 U.S. at 444, 100 S. Ct. at 2281.

Here the State is restricting the flow of a state-owned natural resource rather than a state-owned man-made commodity.

Timber is not a commodity which, when needed, is capable of being readily produced by any state at any time. Conversely, a state may enter the cement business, with little problem, in order to supply its region with needed cement. The uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow, prevent a state from economically discriminating in favor of its residents simply because a resource lies on state-owned land.

The court finds that the State's primary manufacture requirement goes beyond the *Alexandria Scrap* exemption, as a natural resource is involved. The *Alexandria Scrap* general rule is not a magic talisman which allows a state to place unconstitutional restrictions on a resource if it is state-owned. While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not "attach conditions to the use or disposition of the resource that might independently burden interstate commerce" *Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup.Ct.Rev. 51, 71 (1980).

Since the court has determined that the primary manufacture requirement goes beyond the *Alexandria Scrap* exemption, it must determine whether this requirement unconstitutionally burdens commerce.

2. The Pike Test

The Supreme Court has set forth the criteria for determining the validity of state actions affecting interstate commerce. The rule that emerges is that:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the

local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted).

Under this test, the primary manufacture requirement is unconstitutional. The requirement does not regulate even-handedly, as it does not fall evenly on companies with in-state timber mills and companies with out-of-state timber mills; the requirement precludes South-Central from competing on equal footing with companies that possess in-state mills capable of performing primary manufacture.

Additionally, the public interest served goes beyond the Court's sanction of permissible commerce clause burdens. See e.g. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (state regulation furthering public safety, but burdening commerce held permissible). Here the purpose served is economic—"to protect existing industries, provide for the establishment of new industries, [and] derive revenue from all timber resources" Governor's Office News Release (June 30, 1961) (Governor Egan's policy statement on primary manufacture).

Through the years, the Supreme Court has been alert to the evils of economic protectionism. The Court frequently has indicated that the purpose of the commerce clause was to avoid "the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 332, 325 (1979). "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. at 624.

Turning to the "burden" side of the *Pike* test, the primary manufacture requirement places a substantial rather than an incidental burden on commerce. The application of the primary manufacture requirement would, at the least, require companies without mills in Alaska to lease mill facilities within the

state capable of performing the requirement. Indeed, the "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike*, 397 U.S. at 145.

Finally, the court finds that less burdensome means are available to the State to achieve the same end. For example, the state may implement a statutory scheme which encourages in-state processing rather than action which bars out-of-state processing. This is, however, a legislative question; the court simply notes other schemes are available.

Accordingly, IT IS ORDERED:

1) THAT plaintiff's motion for summary judgment is granted.

2) THAT defendant's motion for summary judgment is denied and intervenor's motion to dismiss is denied.

3) THAT the clerk may prepare a final judgment form stating that the named defendants or any official of the State of Alaska are permanently enjoined from requiring primary manufacture of state-owned timber pursuant to 11 A.A.C. § 76.130, as the requirement of primary manufacture violates art. I, § 8 of the United States Constitution.

DATED at Anchorage, Alaska, this 5th day of January, 1981.

/s/ JAMES A. VON DER HEYDT

United States District Judge

cc: Leroy E. DeVeaux

Mark L. Figura

Shelley Higgins, Assistant Attorney General

**JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ALASKA
(ENTERED JAN. 6, 1981)**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

Civil Action File No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

v.

**ROBERT LERESCHE, Commissioner of the Department of
Natural Resources of the State of Alaska, et al.**

This action came on for (hearing) before the Court, Honorable James A. von der Heydt, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the named defendants or any official of the State of Alaska are permanently enjoined from requiring primary manufacture of state-owned timber pursuant to 11 A.A.C. § 76.130, as the requirement of primary manufacture violates art. I, Section 8 of the United States Constitution.

JUDGMENT

FILED

January 6, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

By _____ Deputy

Costs taxed by Clerk in amount
of \$112.00 on January 21, 1981.

/s/ D. COKER

D. Coker
Deputy Clerk

Dated at Anchorage, Alaska, this 6th day of January, 1981.

APPROVED:

/s/ JAMES A. VON DER HEYDT

James A. von der Heydt
United States District Judge

JOANN MYRES

JoAnn Myres
Clerk of Court

By: /s/ DONNA COKER

Donna Coker
Deputy Clerk

COPY FILED IN O. & J. VOL. 1755

PAGE ____.

**OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT (ENTERED
DEC. 1, 1982)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-3053X
81-3081X

D.C. No.
A80-311 Civ.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appellee,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska; *et al.*,
Defendants-Appellants,

KENAI LUMBER COMPANY, INC.,
Intervenor Defendant.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appelles,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska; *et al.*,
Defendants,

KENAI LUMBER COMPANY, INC.,
*Intervenor
Defendant-Appellants.*

FILED

December 1, 1982

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

OPINION

**Appeal From The United States District Court
For The District Of Alaska**

**Honorable James A. von der Heydt, Chief Judge,
United States District Judge, Presiding**

Argued and Submitted: December 10, 1981

Before: GOODWIN, KENNEDY, and SKOPIL, Circuit Judges.

KENNEDY, Circuit Judge:

The State of Alaska, by statute, authorizes the imposition of certain conditions on the sale of state-owned timber, conditions pointedly designed to favor its local timber processors. In an action brought by a prospective timber buyer challenging the constitutionality of the state's restrictions, the district court held the Alaska statute violates the commerce clause of the United States Constitution. We conclude there is implicit approval of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands. We reverse the district court's finding of invalidity.

The Commissioner of the Department of Natural Resources of Alaska is by law given discretion to condition particular sales of timber on primary manufacture in Alaska.¹ In 1980 the Commissioner gave notice of a proposed sale of state-owned timber at Icy Cape and announced that Alaska would require

¹ The Commissioner of the Department of Natural Resources of Alaska, upon recommendation of the Director of the Division of Lands of the Department of Natural Resources, "shall determine the timber and other materials to be sold, and the limitations, conditions and terms of sale." Alaska Stat. § 38.05.115.

The Alaska regulations provide that:

- (a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

primary manufacture within the state as a special provision of the contract.² The Commissioner stated the requirement was necessary to insure "a continuing supply of timber for existing

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

11 A.A.C. 76.130. The primary manufacture requirement is defined further by the Governor's Policy Statement of Primary Manufacture of May 7, 1974.

² The notice of public sale set out the primary manufacture contract term as follows:

Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974. For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips are considered to have received primary manufacture.

industry" during temporary shortages of timber from federal lands. Final Finding for Icy Bay/Cape Yakatuga Sale at 2 (Excerpt of Record (E.R.) 121, 122).

Appellee South-Central Timber Development, Inc. is an Alaska corporation engaged in purchasing timber and processing it for sale. It does not own an operating mill in Alaska, and its practice had been to process Alaskan timber outside the state. When it learned of the new requirement, South-Central brought this action for injunctive relief against various state officials. The company claimed it was prevented from bidding on the Icy Cape sale by the added expense of in-state processing. The district court granted a temporary restraining order, and when it expired the applicants agreed to postpone the sale until a final decision on the merits.

Kenai Lumber Company, Inc. intended to bid at the Icy Cape sale to obtain timber for its sawmill in Alaska. The district court allowed Kenai to intervene in the suit as a defendant. Upon cross-motions for summary judgment, the district court granted summary judgment for plaintiff-appellee, and concluded that the primary manufacture requirement put an impermissible burden on interstate commerce.

It long has been settled that states may regulate in some areas of commerce, absent congressional action to displace such laws, *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. 298 (12 How.) (1851); but state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). The rule has been invoked to invalidate state statutes which promote local processing industries by forbidding shipment of raw resources, *Foster-Fountain Packing v. Haydel*, 278 U.S. 1 (1928). The commerce clause by its own power invalidates such discriminatory statutes.

Despite the force of this rule, there are narrow exceptions, as in the case of a state proprietary activity. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). Alaska contends its statute is saved

by that exception here. We need not reach the question, however. This is not a case where the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy.

While there may be some outer limits to its power, it is generally accepted that Congress is free to approve and thereby validate commercial regulations otherwise beyond a state's authority. Congress can "confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44.

The rule acknowledging congressional power to approve otherwise impermissible state regulation of interstate commerce usually is applied in cases where Congress has expressly authorized such regulation, *see, e.g., Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981). But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests.

The federal government has consistently endorsed restrictions on the interstate shipment of timber to protect the local processing capability of isolated areas, evincing a general federal policy of promoting geographic dispersion in the timber industry. Since 1928 the Forest Service has limited the export of unprocessed logs from National Forests in Alaska under general authority granted by the Organic Administration Act of June 4, 1897 (16 U.S.C. § 475, 551). In 1969 Congress set a quota on the unprocessed timber that could be exported from federal lands west of the 100th meridian (a line running south from the mid-point of the North Dakota-Canadian boundary, through central Texas). Lindell, *Log Export Restrictions of the Western States and British Columbia*, 7 (U.S. Dept. of Agri-

culture 1978) (E.R. 130). In 1973 Congress strengthened its policy by a complete ban on the export of unprocessed timber from such lands.³

When Alaska was admitted to statehood in 1959 and received title to a large portion of the territory's public lands, it continued to adhere, with limited exceptions, to preexisting federal policy.⁴ Lindell, *Log Export Restrictions of the Western States and British Columbia*, 7 (U.S. Dept. of Agriculture 1978) (E.R. 135). The state's primary manufacture requirements duplicate those imposed on federal timber and serve the same objective, that of promoting industrial developments in isolated areas. The decision of Alaska's Commissioner of Natural Resources to condition the sale at Icy Cape on primary manufacture was made in the wake of a temporary suspension of federal timber sales from the Tongass and Chugach National Forests. Final Findings on Icy Bay/Cape Yakatuga Sale at 2 (E.R. 122). Its purpose was to protect local processors from

³ The Forest Service regulations are found at 36 C.F.R. § 223.10(b) (1981). The Bureau of Land Management provisions are set forth at 43 C.F.R. §§ 5400.0-3(c), -5 (1981).

⁴ The regulations for Alaska state:

Unprocessed timber from National Forest System Lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. *This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities.* In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (1) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire, or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

36 C.F.R. § 223.10(c) (1981) (emphasis added).

the resulting slack in demand for their services. The state's decision could not have been more in keeping with federal timber policy. In these circumstances, we find ample congressional acquiescence in Alaska's primary manufacture requirement. The judgment of the district court is REVERSED.

**JUDGMENT OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT
(ENTERED DEC. 1, 1982)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-3053
81-3081
DC CV 80-3111 JAH

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appellee,

v.

ROBERT LERESCHE, Commissioner of the
Department of Natural Resources of the State
of Alaska; et al.,
Defendants-Appellants,

KENAI LUMBER COMPANY, INC.,
Intervenor, Defendant-Appellant.

JUDGMENT

APPEAL from the United States District Court for the
_____ District of ALASKA (Anchorage)

THIS CAUSE came on to be heard on the Transcript of the
Record from the United States District Court for the _____
District of ALASKA (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here
ordered by this Court, that the _____ judgment of the said
District Court in this Cause be, and hereby is reversed.

ARMS DEC 28 1982

A TRUE COPY

ATTEST MAR 31 1983

PHILLIP B. WINBERRY

CLERK

by Jereldine Curtis, Senior Deputy

JERELDINE CURTIS

Filed and entered December 1, 1982